90-1232

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

SMS Data Products Group, Inc.,

Petitioner,

v.

The United States and
Data General Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John G. Kester
Counsel of Record
F. Whitten Peters
Laura P. Masurovsky

Williams & Connolly
839 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Counsel for Petitioner

QUESTION PRESENTED

1. Whether the express, statutory bid protest jurisdiction of the General Services Administration Board of Contract Appeals, created in 1984, is implicitly limited by restraints imposed on the Administrator of the General Services Administration contained in legislation passed in 1965?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings below were the petitioner, SMS Data Products Group, Inc. ("SMS"), respondents Data General Corporation (appellant below) and the United States (appellee below), on behalf of the Department of the Interior, United States Geological Survey, and an intervenor below, Lockheed Missiles & Space Company, Inc. SMS has no parent or subsidiary corporations.

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The petitioner, SMS Data Products Group, Inc. ("SMS") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") entered in the above-captioned proceeding on October 9, 1990.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 915 F.2d 1544 (pp. 1a-39a, *infra*).

The opinion of the General Services Administration Board of Contract Appeals is reported at 90-2 B.C.A. (CCH) ¶ 22,799 (pp. 40a-105a, *infra*).

JURISDICTION

The jurisdiction of the General Services Administration Board of Contract Appeals ("the Board") arose under 40 U.S.C.A. § 759(f) (Supp. 1990). Review in the Federal Circuit was sought pursuant to 40 U.S.C. § 759(f)(6)(A), which permits appeal from the decisions of the Board in accordance with 41 U.S.C. §§ 607(g)(1)(A) (1988). The standard for appellate review of Board decisions is set forth at 41 U.S.C. § 609(b) (1988).[1/]

1/ 41 U.S.C. § 609(b) provides in relevant part:

> In the event of an appeal * * * from a decision of any agency board pursuant to section 607 of this title, * * * the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by sub-

(continued...)

The opinion of the Federal Circuit issued on October 9, 1990. A timely motion for rehearing and rehearing en banc was made by SMS on October 23, 1990. The motion for rehearing was denied on November 6, 1990. (Pp. 106a-107a, *infra*). The motion for rehearing en banc was denied on November 20, 1990. (Pp. 108a-109a, *infra*). The jurisdiction of this Court to review the judgment of the Federal Circuit arises under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case of first impression involves the proper construction of sections 759(e) and 759(f) of the Brooks Act, 40 U.S.C. § 759. Section 759(e) provides in relevant part:

1/ (...continued)
stantial evidence.

> The authority conferred upon the Administrator [of GSA] and the Secretary of Commerce by this section shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Office of Management and Budget. Authority so conferred upon the Administrator shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and selection of the types and configurations of equipment needed.

Section 759(f) provides in relevant part:

> (1) Upon request of an interested party in connection with any procurement conducted which is subject to this section (including procurements subject to delegation of procurement authority), the board of contract appeals for the General Services Administration (hereafter in this subsection referred to as the "board"), shall review any decision by a contracting officer alleged to violate a statute or regulation. Such review shall be conducted under the standard applicable to review of

contracting officer final decisions by boards of contract appeals.

* * *

(5)(A) In making a decision on the merits of protests brought under this section, the board shall accord due weight to the policies of this section and the goals of economic and efficient procurement set forth in this section. The board may consider any decision, determination, opinion, or statement made by the Director of the Office of Management and Budget or any officer of any other Federal agency regarding applicability of this section to a particular procurement, and may request the advice of the Director or such officer with regard to such applicability, but shall not be bound by any such decision, determination, opinion, or statement when determining whether a procurement is subject to this section.

(B) If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or

the Administrator's delegation of procurement authority applicable to the challenged procurement.

STATEMENT OF THE CASE

In early 1989, the United States Geological Survey ("USGS") issued a Solicitation to procure in excess of $125 million of automated data processing equipment ("ADPE") for its Water Resources Division. (Pp. 2a-3a, *infra*). SMS, Data General Corporation ("Data General") and Lockheed Missiles & Space Company, Inc. made offers to USGS to supply this equipment. The equipment to be purchased would be configured as a "system" with each system serving one USGS office location. (Pp. 43a-46a, *infra*).

The Solicitation described two functional types of equipment: (1) workstations with keyboards and video displays at

which USGS operators would be stationed; and (2) computational servers and file servers, auxiliary computers used as a "back ends" to perform operations upon the request of a workstation. (Pp. 4a-5a, *infra*). All computer processors in the system were to be connected locally, to permit the sharing of information and workloads, and the systems would be connected together over the phone system into a nationwide network. (P. 6a, *infra*).

USGS determined that SMS and Lockheed received perfect technical scores, and Data General somewhat less. Nontheless, USGS found all of the offerors to be technically equal and proceeded to make an award based on price. SMS was the lowest-priced offeror (by over $10 million), Data General was second, and Lockheed third. After the receipt of best and final of-

fers, however, the contracting officer determined that SMS failed to offer software licenses that complied with the Solicitation because the Solicitation required that the equipment be delivered with licenses under which all possible users could operate all software simultaneously on all central processors in the system and SMS had proposed licenses which restricted the number of users on the system. Accordingly, the contracting officer announced an award to Data General. (Pp. 9a-14a, *infra*).

SMS brought a protest against its disqualification and the award to Data General in the GSA Board of Contract Appeals pursuant to 40 U.S.C. § 759(f). Lockheed also filed a protest.[2/] Data

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2/ Several issues raised by Lockheed were rejected by the Board. No party appealed from the rulings on these issues.

General intervened in the Board proceedings in support of its award. After a hearing before the Board, the Board entered an opinion and order finding that the language of the Solicitation did not in fact implement USGS' stated requirement that all software be licensed for an unlimited number of simultaneous users running on any processor -- server or workstation -- on the system. (Pp. 89a-92a, *infra*). In addition, the Board held, if the Solicitation had contained such a requirement, then all offerors would have failed to comply with it because all offerors had proposed some software which in part ran on the workstation and in another part ran on a server, and none of the offerors had licensed the server portion of the software to run simultaneously on

all workstations in the system.[3/] (Pp. 60a-62a, *infra*). Where no offeror makes a compliant proposal, the Board held, Federal Acquisition Regulation § 15.611(c) requires that an agency conduct a further

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3/ With respect to Data General, the Board held:

> "Even though Data General did not separately price its software * * * one can only reasonably conclude that Data General's bundled prices did not allow for licenses for front-end use of back-end software and vice versa. This is because Data General proposed to use a dedicated server, it separately listed software server only licenses and work station only licenses in its proposal in insufficient quantities to cover all processors, and it benchmarked its software by running back-end on the servers and front-end on the work stations. * * * The contracting officer, however, testified that Data General's software packages listed in its proposal as "Work station License Only" could nevertheless be ordered for the servers * * *. We disagree with the contracting officer's interpretation of Data General's cover letter because this letter references CLINs limited only to workstations which are not intended to cover servers."

(Pp. 60a-62a, *infra*).

round of best and final offers. (Pp. 93a-94a, *infra*).

In the course of its decision, the Board, quoting Data General's expert, also questioned whether USGS had not been "'incredibly stupid'" to require that server software run on workstations. (P. 95a, *infra*). However, the Board's remand order did not prohibit USGS from imposing even an "incredibly stupid" requirement so long as it stated its requirements clearly:

> For the reasons stated, we * * * revise respondent's delegation of procurement authority to require respondent, if it intends to procure these requirements, to amend the solicitation to reflect its true software licensing requirements, conduct further discussions with the offerors, and obtain revised BAFOs [best and final offers] in accordance with the guidance provided in this opinion.

(Pp. 104a-05a, *infra* (emphasis added)).

Data General appealed the decision of the Board to the Federal Circuit. SMS and Lockheed intervened to support the Board's decision. The United States, as appellee, joined Data General in urging reversal of the Board. No party to the appeal challenged the Board's finding that none of the offerors had proposed licenses permitting an unlimited number of users to operate all software simultaneously in all processors, and therefore all offerors failed to comply with a mandatory term of the solicitation as interpreted by the USGS. Nonetheless, the Federal Circuit reversed and ordered that an award be made to Data General.

In reversing, the Federal Circuit held that the Solicitation

> could not be clearer. It requires that software licenses allow (1) all software to be executed on all processors and

(2) all users to execute the software simultaneously.

(P. 20a, *infra*). Although the Federal Circuit is bound by findings of fact supported by substantial evidence, *see* footnote 1, *supra*, it simply ignored the unchallenged finding that Data General did not propose licenses under which "all software [could] be executed on all processors." Instead, citing restrictions on the Administrator of GSA found in 40 U.S.C. § 759(e), the Court held that the Board had exceeded its jurisdiction by insisting that USGS clearly and unequivocally state its technical specifications. (Pp. 36a-39a, *infra*). The Federal Circuit then reversed and reinstated the award to Data General. (*Id.* at 39a).

SMS requested rehearing of the Circuit's decision, arguing that the Circuit's reference to § 759(e) was a non

sequitur, since the Board has independent jurisdiction to hear bid protests and in performing this function, is not the delegate of the Administrator of GSA. In addition, SMS argued that the Brooks Act required the Board to review procurements for compliance with statute and regulation, 40 U.S.C. §§ 759(f)(1), 759(f)(5)(B), including statutes, such as 41 U.S.C. §§ 253a(a)(1)(A), 253a(a)(2)(B) (1988), which place limitations on specifications agencies may use in solicitations. Finally, SMS urged that the Federal Circuit itself had erred by ignoring an unchallenged finding of fact made by the Board and ordering the reinstatement of Data General's contract. The Federal Circuit denied both rehearing and rehearing in banc. (Pp. 106a-109a, *infra*).

REASONS FOR GRANTING THE WRIT

For the second time in four years, the Federal Circuit has improperly narrowed the scope of the Board's bid protest jurisdiction. Congress created that jurisdiction in 1984 as part of the Competition in Contracting Act ("CICA"), Pub. L. No. 98-369, Div. B, Title VII, § 2317(a), 98 Stat. 1182. The Board was given jurisdiction to determine if a procurement complied with "statute or regulation" and, if not, compel compliance by the agency. 40 U.S.C. § 759(f)(5)(B). By creating the Board's jurisdiction within CICA, the draftsmen of CICA clearly intended that an important function of the Board would be to enforce CICA itself. An important part of CICA, in turn, is language placing stringent restrictions on the types of specifications that may be used by procur-

ing agencies. *See, e.g.*, 41 U.S.C. § 253a (1988).

By its decision below, however, the Federal Circuit withdraws the Board's clear jurisdiction to determine compliance with any applicable procurement statutes or regulations, including CICA. Instead, citing 40 U.S.C. § 759(e), which was added by Public Law 89-306, 79 Stat. 1127, in 1965, almost 20 years before CICA, the Court holds that the Board has no greater power over agency action than the Administrator of GSA, who in turn may not

> impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and selection of the types and configurations of equipment needed.

40 U.S.C. § 759(e).

Four years ago, the Federal Circuit similarly applied its theory that the

Board is no more than the delegee of the GSA Administrator to narrow the jurisdiction of the Board.[4/] *See Electronic Data Systems Federal Corp. v. GSA Board of Contract Appeals,* 792 F.2d 1569, 1577-83 (Fed. Cir. 1986) (*"EDS"*). Ignoring the clear intention of Congress to create the Board as an expert tribunal for ADP related dispute resolution, the Federal Circuit in *EDS* also casually remitted protestors to other protest forums. *Id.* at 1582-83. Five months later, Congress amended the Brooks Act in the Paperwork Reduction Reauthorization Act Amendments of 1986, Pub. L. Nos. 99-500 and 99-501, 100 Stat. 1783, expressly to reverse the

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4/ The Federal Circuit has also cut back the jurisdiction of the Board in *United States v. International Business Machines Corp.*, 892 F.2d 1006 (Fed. Cir. 1989).

Federal Circuit. See H.R. Rep. No. 99-1005, 99th Cong., 2d Sess. 773 (1986).

Notwithstanding this swift and clear Congressional action, the Federal Circuit persists in its hostility toward the Board and its erroneous understanding that the Board in bid protests has no more authority than the Administrator of GSA. Since the jurisdiction of the Federal Circuit over Board decisions is exclusive, there is no court other than this Court which can correct the repeated errors of the Federal Circuit.

I. THE BOARD OF CONTRACT APPEALS HAS JURISDICTION TO REVIEW AN AGENCY'S CHOICE OF TECHNICAL SPECIFICATIONS FOR COMPLIANCE WITH STATUTE AND REGULATION

A. THE COMPETITION IN CONTRACTING ACT REGULATES TECHNICAL SPECIFICATIONS IN SOLICITATIONS

In 1984, Congress passed the Competition in Contracting Act ("CICA"), which rewrote federal procurement laws to create competition in the procurement system. Through competition, Congress found, the government would be able to purchase better products at lower prices. *See, e.g.*, S. Rep. No. 98-50, 98th Cong., 1st Sess. 3 (1983).[5/] Equally important, Congress hoped to increase the fairness of federal procurement, finding that competition "maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on merit." *Id.*

Mindful that federal agencies, although empowered to do so, had not them-

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5/ Much of the Competition in Contracting Act was drawn from S. 338 as passed by the Senate on November 11, 1983. Senate Report 98-50 accompanied S. 338.

selves created a competitive procurement system, *e.g.*, *id.* at 3, 6-8, 15-16, Congress included in CICA a number of provisions intended to force competition on contracting agencies. Among these were that an agency was required to "specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement" and to "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law." 41 U.S.C. §§ 253a(a)(1)(A), 253a(a)(2)(B) (1988). These provisions were a direct response to Congress' finding that

> [d]espite the present regulatory requirement that specifications shall be "a clear and accurate description of the technical requirements for a material, product, or service," * * * agencies have used specifications to restrict competition by unneces-

> sarily defining their needs too narrowly.
>
> * * * "[G]overnmental specifications * * * are often so restrictive or outdated that only one firm can qualify to bid on the contract." The reasons for improper specifications in some cases are bias or favoritism, and in others, it is the lack of sufficient personnel capable of developing appropriate specifications.
>
> The Committee agrees * * * that agencies should take steps to ensure that contract specifications are not unnecessarily restricting. General guidelines should be established * * * which require specifications to be consistent with the agency's minimum needs and allow restrictive provisions only to the extent necessary to meet those needs.

S. Rep. No. 98-50, at 14-15.

B. THE GSA BOARD PROTEST PROCESS WAS CREATED TO ENFORCE STATUTES AND REGULATIONS INCLUDING CICA

As an integral part of CICA, Congress reinvigorated the bid protest process in

the General Accounting Office ("GAO") and established a new protest jurisdiction for automatic data processing procurements in the GSA Board of Contract Appeals. *See* Pub. L. No. 98-369, Div. B, Title VII, §§ 2317(a), 2741(a), 98 Stat. 1182, 1199. These changes were necessary to address the failure of the old GAO protest system to "provide an adequate remedy to those wrongly excluded from procurements." H.R. Rep. No. 1157, 98th Cong., 2d Sess. 23 (1984). Since Congress specifically found that one of the chief reasons for such wrongful exclusion had been agencies' failure to write open specifications, it is indeed remarkable that the Federal Circuit should conclude that the Board has no jurisdiction to enforce those portions of CICA which deal with specifications. The Federal Circuit's conclusion is even more

remarkable given the language of the Board's authorizing statute, which provides without any express limitation that the Board has authority to grant a remedy "if challenged agency action violates a statute or regulation." 40 U.S.C. § 759(f)(5)(B).

There is certainly no warrant for the Federal Circuit's implied exemption anywhere in the legislative history. Indeed, the legislative history is strongly to the contrary.

CICA empowered the Board (and GAO) to adjudicate protests alleging without limitation that agencies had failed to comply with procurement statutes and regulations, including CICA. "[T]he Board will have authority to suspend or cancel any solicitation or contract that violates law or

regulation." H.R. Rep. No. 98-1157, at 26.

In 1986, Congress reaffirmed the broad authority of the Board by amending 40 U.S.C. § 759 to reverse decisions of the Federal Circuit and the Office of Management and Budget which had narrowed the express jurisdiction of the Board. The accompanying Conference Report lauded the Board for its "handling [of] protests of a highly technical and complex nature." H.R. Rep. No. 99-1005, 99th Cong., 2d Sess. 774.

> With the Board, vendor [sic] are far better assured that the Federal procurement system has treated them fairly and honestly without the agency running slipshod over statutes and regulations * * *.

Id. at 774-75. Congress went on expressly to criticize the Federal Circuit for "undermining [] the Board's authority and

jurisdiction." *Id.* at 775. And lest there be any doubt about how Congress wanted the Federal Circuit to interpret the Board's jurisdiction in future cases, Congress wrote:

> The importance of the Board's responsibilities continues to grow as the Federal Government enters into more contracts subject to the Board's protest authority. In conjunction with this, it is the intent of Congress that the refinements in the statute reveal that expanded authority has been placed in the Board, whose jurisdiction and functions shall be broadly construed so as to effectuate the purposes underlying the original grant of protest jurisdiction to it. Thus, the Board may issue orders and grant other relief in its decisions as may be necessary to ensure compliance with statutes and regulations that foster and require economy and efficiency, and full and open competition.

Id. at 775 (emphasis added). Since the provisions of CICA restricting the form and nature of technical specifications are

clearly among the "statutes and regulations that foster and require * * * full and open competition," *id.*, there can be absolutely no doubt that Congress intended the Board to be able to enforce these statutes against federal agencies.

II. WHEN THE BOARD EXERCISES ITS PROTEST JURISDICTION, IT IS NOT FUNCTIONING AS THE DELEGATE OF THE GSA ADMINISTRATOR

The Federal Circuit appears under to be operating under a fundamental misunderstanding of the relationship between the Administrator of GSA and the GSA Board. According to the Federal Circuit, the Board takes its authority from the Administrator of GSA and is subject, therefore, to all restrictions placed on the Administrators powers. However, this places the cart before the horse.

In 1965, the Administrator was tasked by the Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127 (1965), to establish a centralized system for procuring, using and reusing data processing equipment for the federal government. Under that system, the Administrator either procures ADPE for an agency or delegates his procurement authority to an agency on a case by case basis. 40 U.S.C. §§ 759(a)-(b). Under the Brooks Act, the authority of the Administrator is circumscribed by the Office of Management and Budget and the President. 40 U.S.C. § 759(e).

Until 1978, it may have been that the GSA Board of Contract appeals was no more than an agent of the Administrator of GSA, tasked by the Administrator to determine contract disputes that might otherwise go to the Administrator. However, with the

passage of § 8 of the Contract Disputes Act of 1978, 41 U.S.C. § 607 (1988), all boards of contract appeals were placed on a distinct statutory footing with powers parallel to those of the trial division of the Court of Claims and, later, the United States Claims Court.

In 1984, when Congress created the Board's protest jurisdiction, Congress was very clear that the protest authority went directly to the Board, intentionally by-passing the Administrator of GSA who was perceived to lack objectivity. H.R. Rep. No. 98-1157, at 26. The Board, Congress found,

> is outside the scope of GSA's normal everyday operations. As such, the Board is looked upon by the agencies and the vendor community as an objective forum in which to resolve contractual disputes.

Ibid. (emphasis added). That the Board is separate and distinct in its protest jurisdiction was reinforced by the 1986 amendments to the Brooks Act, which added the following language:

> The Board may consider any decision, determination, opinion, or statement made by the Director of the Office of Management and Budget or any officer of any other Federal agency regarding applicable of this section to a particular procurement, * * * but shall not be bound by any such decision, determination, opinion, or statement when determining whether a procurement is subject to this section.

40 U.S.C. § 759(f)(5)(A) (emphasis added).

Moreover, it is important to recognize, as the Federal Circuit did not, that the Board actually has power to issue a judgment confining the Administrator to a lawful exercise of his powers. *See* 40

U.S.C. § 759(f)(5)(b).[6/] Thus, in the implementation of the remedial scheme created by Congress, the Administrator is in a very real sense the agent of the Board, not the other way around.

III. NO CONCEIVABLE PURPOSE WOULD BE SERVED BY EXCLUDING THE BOARD FROM REVIEWING TECHNICAL SPECIFICATIONS IN AGENCY PROCUREMENTS

It is impossible to imagine, and the Federal Circuit does not explain, why Congress in CICA would (a) establish the Board as an expert technical tribunal for ADPE protests and (b) restrict the technical specifications that agencies can use, but (c) strip the Board of power over

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6/ "If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator * * *." (Emphasis added).

technical specifications by subjecting the Board to 40 U.S.C. § 759(e), all with the result that disputes about the application of statutory restrictions on specifications in ADPE contracts are sent to alternate protest forums, such as the District Courts, *e.g.*, *Scanwell Labs., Inc. v. Shaffer,* 424 F.2d 859 (D.C. Cir. 1970), the Claims Court, *see* 28 U.S.C. § 1491(a)(3); *Keco Indus., Inc. v. United States,* 492 F.2d 1200 (Ct. Cl. 1974), or the GAO, *see* 31 U.S.C. §§ 3551-56. But that is the practical consequence of the decision below.

Certainly Congress did not intend to free agencies from bid protests based on the specification restrictions in, *e.g.*, 41 U.S.C. § 253a. CICA is plainly to the contrary. Moreover, even if that had been Congress' intent, § 759(e) does not accom-

plish that goal, since, among others, the GAO routinely reviews solicitation specifications for compliance with CICA. *See, e.g., Fleetwood Electronics, Inc.*, 85-1 CPD ¶ 664 (GAO 1985); *Lista International Corp.*, 63 Comp. Gen. 447, 84-1 CPD ¶ 665 (GAO 1984).[7/]

CONCLUSION

The Federal Circuit has adopted an understanding of the Brooks Act that is inimical to the language of that Act and to Congress' purpose in establishing bid protest jurisdiction in the General Services Administration Board of Contract

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7/ In *Lista*, GAO stated the law succinctly:

> "[A]lthough an agency generally enjoys broad discretion in determining its needs, when a protester challenges a particular specification as being unduly restrictive of competition, it is incumbent upon the agency to establish prima facie support for the restriction."

Appeals. The GSA Board was intended by Congress to be the premier technical forum for resolving questions concerning the procurement of automated data processing equipment. The decision below strips the Board of an important part of its jurisdiction and for no apparent reason sends ADPE protest cases to forums which Congress plainly intended to be secondary. Since appellate jurisdiction over Board decisions resides exclusively in the Federal Circuit, there is no remedy for the error of the Federal Circuit other than review in this Court.

The petition for a writ of certioari should be granted.

Respectfully submitted,

John G. Kester
Counsel of Record
F. Whitten Peters
Laura P. Masurovsky

Williams & Connolly
839 - 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Counsel for Petitioner

February 4, 1991

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 90-1264.

DATA GENERAL
CORPORATION, Appellant,

v.

THE UNITED STATES, Appellee,

and

SMS DATA PRODUCTS GROUP, INCORPORATED
and LOCKHEED MISSILES & SPACE COMPANY, INC.,

Intervenors-Appellees.

DECIDED: October 9, 1990.

Before MARKEY, Circuit Judge, MILLER, Senior Circuit Judge, and MAYER, Circuit Judge.

OPINION

MAYER, Circuit Judge.

Data General Corporation appeals the decision of the General Services Administration Board of Contract Appeals (board) granting the protest of SMS Data Products

Group, Inc. (SMS) in full, and that of Lockheed Missiles & Space Company, Inc. (Lockheed), consolidated with SMS's protest, in part. *SMS Data Prod. Group, Inc.*, GSBCA Nos. 10468-P, 10474-P, 90-2 B.C.A. (CCH) ¶ 22,799 1990 WL 3188 (Mar. 15, 1990). We reverse.

Background

The United States Department of the Interior, United States Geological Survey (USGS or agency) issued Solicitation No. 7510 on February 10, 1989. Over the seven year life of the contract proposed, the agency intended to purchase, primarily for its Water Resources Division (WRD), in excess of $125 million of automated data processing equipment, including computational workstations and other processors, peripheral hardware, software, training, support, and maintenance. The WRD is the

principal federal water-data agency and is heavily dependent on information systems to fulfill its mission. Systems procured under the instant "DIS II" solicitation are intended to complement and enhance the WRD's existing Distributed Information System (DIS I), which is used to acquire, process, and store in geographic information systems enormous quantities of hydrologic data, to prepare and publish reports, and to support administrative applications.

Because the WRD employs over 4,000 people in more than 200 office locations throughout the United States, and because both the size and needs of individual WRD offices vary widely, the agency stressed in the solicitation its desire for flexibility in configuring and using the systems to be procured. In particular, the

solicitation provides in section C.1.4 that "[i]ndividual systems will be custom-configured by the Government at the time each is purchased," and "[e]ach location acquiring a system may have a unique configuration, but the family of components comprising all possible systems will be common." Components to be purchased under the contract include computational workstations, each having a graphics display, keyboard, and mouse; additional processors to serve as computational or file servers; and peripheral hardware necessary, for example, to network both individual workstations and independent systems. Each "system" includes these hardware components as well as attendant software: "the total complement of hardware and software acquired for one location."

The solicitation requires that certain hardware external to the systems -- for example, data gathering and output devices located in field or office, and interactive dumb terminals (IDTs), which do not themselves process information but allow their users to access and operate components of the systems -- nevertheless interface and communicate with them. Similarly, systems acquired under the solicitation must be capable of communicating interactively with one another as well as processing information and using software resident on existing WRD systems. Chief among these is the DIS I, which consists of 71 Prime computers with a common operating system, common hardware functionality, and common interconnection to the agency's GEONET network.

The contractor must provide the additional hardware and software necessary to meet these connection requirements. For example, the solicitation specifies that each workstation be equipped with at least two asynchronous communications ports to accommodate IDTs, data gathering devices, data output devices, and the like. Each workstation also must have a minimum of three synchronous communications ports to allow networking. Individual DIS II system components must be connected to each other and to local DIS I hardware, like IDTs, via a Local Area Network (LAN). Remote LANs are in turn connected by wide area networks (WANs). Finally, remote WANs are connected with each other and with remote DIS I equipment via GEONET, the USGS global communications network.

The complexity of the DIS II system, and the impossibility of precisely predicting the agency's future information processing needs, dictate that USGS retain the ability to configure individual systems as local needs and unforeseen circumstances require. For instance, in small WRD offices, workstations might be able to share information processing with a computational or file server, thereby more effectively accomplishing assigned tasks. But the same approach could prove unworkable in large WRD offices, where larger numbers of users could render the link between workstations and server a "bottleneck." In this situation, an alternative solution is to provide each workstation with the necessary data storage and/or processing capability to do the job alone. To accommodate these and other possible

system configurations, the solicitation requires very broad software licenses. In particular, vendors must offer licenses allowing all software to be executed simultaneously both on all processors and by all users -- unlimited use site licenses. This requirement is the focus of the case.

To be technically acceptable, an offeror's system had to satisfy the technical requirements contained in section C of the solicitation, which includes the licensing provision, as well as successfully complete a benchmark test. The solicitation makes clear that the agency intended to use the benchmark "for the purpose of cost evaluation and testing" only: this or similar language is used no fewer than seven times to describe the benchmark. Attachment H to the solicitation describes the benchmark in detail; it

required vendors to assemble and demonstrate the capabilities of four computer systems, consisting of 5, 15, 30, and 60 workstations, respectively. In each system, only a single user was assigned to each workstation. Although vendors could use additional processors to function as computational or file servers, none of the specified systems included or interfaced with external hardware and none was connected to another benchmark system. Only the individual workstations within each system were networked.

Data General, SMS, and Lockheed each submitted initial proposals that met the requirements of section C and passed the benchmark. Since the three received nearly identical overall technical scores, the contracting officer informed them prior to the submission of best and final offers

(BAFOs) that price would control award. SMS subsequently submitted the lowest-priced offer, Data General the second-lowest, and Lockheed by far the highest. But the contracting officer disqualified SMS from the competition because, among other reasons, she determined that SMS had altered its initial proposal in two critical respects that rendered it technically noncompliant.

First, SMS proposed to split the licensing of some of its database software between workstations and servers -- a "front-end back-end" approach to licensing in which one portion of a software package is licensed only for the workstations in a system and the remainder is licensed only for the servers. The contracting officer considered this a violation of the requirement that all software be licensed

for all processors. Alternatively, the contracting officer found that if SMS allowed the agency to purchase full licenses for both workstations and servers, its total price would exceed Data General's. In either case, SMS was not entitled to award.

Second, in a letter sent to the contracting officer the day following submission of its BAFO, SMS "clarified" that it intended to license its software according to the number of users per system rather than the number of processors per system, as stated in its BAFO. Unlike the latter approach, in which all users of a processor are entitled to use the software licensed for that processor simultaneously, in SMS's user-based approach only a specified number of users can execute the software regardless of the number of proces-

sors to which they have access. In response to a draft SMS licensing agreement, submitted the day before BAFOs were due, the contracting officer had specifically warned SMS that the approach was unacceptable. In her view, it did not satisfy the requirement for unlimited use site licenses because SMS had not tried to determine or offered to license the maximum possible number of users of each system. Moreover, the number of users of a real system would vary and therefore be difficult to determine; generally, there would be more than the one user per workstation SMS assumed in its pricing. So even if SMS agreed to license more users per system than the number specified for the benchmark, the contracting officer concluded it would be too difficult to

determine the number of licenses to purchase.

Accordingly, the contracting officer disqualified SMS from the competition and awarded the contract to Data General, which had submitted the next-lowest priced responsive offer. Both SMS and Lockheed protested to the board. *See* 40 U.S.C. § 759(f) (1988). SMS argued that the contracting officer improperly rejected its BAFO on the basis of its licensing provisions, while Lockheed asserted that the proposals of both SMS and Data General were deficient (for reasons other than software licensing), thus entitling Lockheed to the contract. Alternatively, Lockheed argued that the solicitation did not clearly embody USGS's true software licensing requirements and, therefore, the

agency should be required to amend the solicitation and receive new BAFOs.

The board consolidated the protests and ultimately granted SMS's in full and Lockheed's in part. Because it thought "the solicitation used the words 'users' and 'work stations' interchangeably," 90-2 B.C.A. ¶ 22,799, at 114,493, the board determined the solicitation did not prohibit user-based software licensing of the type offered by SMS. *Id.* at 114,496. The board felt the agency's contrary conclusion violated Federal Acquisition Regulation 15.610(c)(3), which requires the contracting officer to "attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal." *See* 48 C.F.R. § 15.610(c)(3) (1989). It also counseled

USGS to reassess its software licensing needs:

> We believe that [the agency] should reconsider whether it really wants to be charged the inevitable higher prices for something-unlimited simultaneous use of software packages -- which, in effect, it admits in its solicitation it will rarely if ever need. If it truly believes such expansive licenses are necessary, it must revise its solicitation to require such licensing terms and obtain revised best and final offers on such a basis.

90-2 B.C.A. ¶ 22,799, at 114,497. As for the requirement that all software be executable on all processors, the board concluded that the solicitation could not prohibit the front-end back-end approach to data processing that all three offerors had used for the benchmark. *Id.* It also questioned

> whether as a practical matter it makes sense to have or pay for a complete database package resident on the 5,185 work stations

> in the cost model, most of which are diskless. Wouldn't it truly be "incredibly stupid" to run [relational data base management system] back-ends on diskless work stations, as testified by Data General's own expert?

Id.

To remedy the perceived ambiguities in and shortcomings of the solicitation, as well as the agency oversights from which the board believed they resulted, the board "revise[d] [USGS's] delegation of procurement authority to require [USGS], *if it intends to procure these requirements, to amend the solicitation to reflect its true software licensing requirements,* conduct further discussions with the offerors, and obtain revised BAFOs in accordance with the guidance provided in this opinion." *Id.* at 114,498 (emphasis added). Data General appeals.

Discussion

The board's decision rests on a misinterpretation of the DIS II solicitation and a misunderstanding of its own limited procurement role. Because the correct interpretation of a solicitation is a question of law, *see SMS Data Prod. Group, Inc. v. United States,* 900 F.2d 1553, 1555-56 (Fed. Cir. 1990), and because the board's authority to pass on an agency's automated data processing needs is circumscribed by statute, *see 40* U.S.C. § 759(e) (1988), we are free to draw our own, contrary conclusions. *See* 41 U.S.C. § 609(b) (1988).

The board made three related errors in interpreting the solicitation. First, driven by its own assessment of the agency's "true" data processing needs, it disregarded the plain meaning of the li-

censing provision. That provision unequivocally requires bidders to provide software licenses not limited to any specific number of users or particular processing configuration. Second, it erroneously equated the terms "user" and "workstation," leading it to misinterpret SMS's proposal as technically compliant. Third, it focused on the parameters of the benchmark test -- deliberately simplified for the purposes of demonstration and evaluation -- to the exclusion of the other technical requirements of the solicitation. This error caused the board to overlook the very raison d'etre of the DIS II procurement: allowing the agency maximum flexibility in procuring, configuring, and using the hardware and software necessary to meet its manifold information

processing needs. We treat each error in turn.

A. The Licensing Provision

In section C.3.3.3, entitled "Software accessibility and licensing," the solicitation provides (emphasis added):

> The users of a system generally perform a wide variety of tasks and shall perform these tasks from their own WS [workstation]. Users shall be able to execute software on any processor that is part of a system in order to optimize performance of the system.
>
> All software procured from the Contractor for a system shall be usable by a *user on any WS* on the system.
>
> All software procured from the Contractor for a system shall be usable by a *user on any IDT* on the system . . . .
>
> *All software acquired under this contract for a system shall be executable on any processor on the system.*
>
> *The Contractor shall provide an unlimited license for software use for any software package*

> *procured. This means all users of the system are allowed to execute the software simultaneously and the software may be executed on all processors that are part of the system.* Although *unlimited use site licenses are required,* the computer systems shall be used for general purpose computing. It is unlikely that a high percentage of users shall be using any one package simultaneously.

The provision could not be clearer. It requires that software licenses allow (1) all software to be executed on all processors and (2) all users to execute the software simultaneously. Since the solicitation elsewhere specifies, and the parties agree, that the term "processors" includes both workstations and servers, SMS's front-end back-end approach to licensing certain data processing software -- in which it licenses a portion of the software for the workstation *only* and the

remainder for the server *only* -- is technically unacceptable.

Moreover, SMS would remain ineligible for award even if its proposal were interpreted to allow full software licensing for all processors. The contracting officer found, and SMS does not contest, that the additional cost of full licensing would have made SMS's proposal more expensive than Data General's. She testified:

> Either I was to assume that the per server price was to be applied for all the work stations or I was to assume that we couldn't buy that piece for the work stations. There didn't seem to be anything else for me to make a determination on. So, either way, they were non-compliant. If they refused to allow us to buy that server side for the work stations, they're technically non-compliant. If they say, "Well, in fact, you can buy it, just use the server line item price for the work stations," it puts them over the top price-wise. They're no longer the low offeror. So, whichever

way I looked at it, it was a problem for SMS.

Similarly, pricing software licenses on a per user basis that assumes a number of users per system, in practice, equal to the number specified for the benchmark -- one user per workstation, equal to 5, 15, 30, or 60 users, depending on the system -- renders SMS noncompliant with section C.3.3.3. This is so for two reasons. First, USGS had no intention of limiting itself in operation to the number of users per system specified for the benchmark. The agency stressed that the benchmark's limitations were artificial and "for the purpose of cost evaluation and testing" only. At least seven times in the solicitation the agency disclaimed any general application of the benchmark specifications. For example, the agency prefaced its "Estimated Acquisition Table," showing

the approximate hardware and software requirements of the various WRD offices, with the proviso: "Although 4 system levels are required for purposes of benchmarking and price evaluation, flexibility is required in configuration of individual systems at both the initial acquisition and subsequent upgrades. Thus, each of the [] locations will have a unique configuration."

Second, although theoretically the maximum possible number of users could be calculated and licensed for each system ordered, SMS made no attempt to do so. It is true that the solicitation does not prohibit user-based licenses per se -- licenses authorizing software use by the maximum possible number of system users are equivalent to unlimited use site licenses -- but SMS limited its licenses to

the number of users per system specified for the benchmark, and failed to take account of the many system users not accessing a system at one of its physically attached workstations.

Besides, given the prices per user quoted by SMS, and assuming the agency could purchase licenses for some reasonable number of real-system users in addition to the one user per workstation figure, SMS's total evaluated price would have exceeded Data General's. Although the contracting officer did not specifically so find in this context, as she did in the context of SMS's front-end back-end licensing approach, on this record the conclusion is equally valid. There is uncontroverted testimony that, assuming only three users per workstation -- fewer than the maximum possible number, accord-

ing to the contracting officer -- SMS's price would exceed Data General's.

To the extent SMS tacitly suggested a middle ground of initially licensing the number of users per system specified for the benchmark and later granting updated licenses when and if the number of actual users exceeded this minimum, we think the contracting officer reasonably rejected it as unworkable. In light of the size and complexity of the DIS II and the unpredictable and transitory nature of its use, especially by remote users, SMS's proposed licensing scheme fails to comply with section C.3.3.3.

B. "Users"

The licensing provision itself makes clear that "users" of the system include users of IDTs as well as users of workstations. Even though IDTs are not them-

selves parts of the systems procured under the contract, section C.3.3.1.6.1. requires that they "operate on a system along with the WS's." In addition to the users of local workstations and IDTs, users of remote workstations and IDTs can become users of a local system via one of the WANs or GEONET. System users also include users of the existing DIS I computers with which all DIS II equipment must interface, as well as non-WRD employees who have their own IDTs and modems -- so- called "cooperators" from state geological surveys and universities who USGS regularly allows to access its computers and who, according to a WRD employee-witness, "are often larger in number than we are in an area."

In short, the board's equating of "user" with "workstation" ignores the

different and much broader uses of the term "user" elsewhere in the solicitation. It also ignores the dozens of instances in which the term "workstation" refers specifically to a computational information processor, together with a graphics display, keyboard, and mouse. Substitution of "user" for "workstation" in these instances would render the solicitation nonsensical. How, for instance, can section C.3.2.11 speak of "[s]ingle-phase, 15-amp, 120-volt operation [being] required for all WS's and equipment directly connected to WS's," if a workstation is equivalent to a user, and vice versa? Contrary to the board's interpretation, the solicitation did not use the terms "user" and "workstation" interchangeably in any context -- even, as

discussed in section C., for the purposes of the benchmark.

Equating the terms led the board to misinterpret both SMS's initial and its final offer. SMS initially proposed to License its software on a per *processor* basis: its proposed response to the solicitation's licensing requirements referred to the "No. of Processors with Licensing," and the accompanying narrative stressed, "Any software procured for a system may be executed on any processor or combination of processors within that system." 90-2 B.C.A. ¶ 22,799, at 114,492. But because the board believed SMS intended to refer to system *users* instead, and because it thought both the solicitation and SMS used the terms "users" and "work stations" interchangeably -- "even though there are places in SMS's responses where direct

substitution of one word for the other would not make semantic sense" -- it interpreted SMS's proposal as licensing specific numbers of *users* per system, dismissing SMS's use of the word "processors" as "an obvious error." *Id.* The board concluded that the "vagueness" in the solicitation's use of the terms "inevitably resulted in a disconnect between SMS's offer and [the agency's] interpretations of its offer." *Id.* at 114,496.

To the contrary, we think the terms of the solicitation are clear and SMS intended, initially, to offer per processor software licensing. Its proposal cannot be reasonably interpreted otherwise. And though it subsequently wavered, as evidenced by an exchange with the contracting officer that the board completely and inexplicably ignored, it continued to

comply with the licensing requirements in its BAFO. One day prior to the submission of BAFOs, SMS telefaxed to the contracting officer a draft licensing agreement which provided, "Use of the software within a system is not restricted to particular workstations, only to the maximum number of authorized users." The contracting officer immediately and unequivocally replied that software licenses limited to a specific number of users per system were unacceptable, and that SMS should change "users" to "processors." SMS did so. In its BAFO, submitted the following day, it proposed to license software "per work station." It explained. "Licenses are priced according to the number of workstations comprising the system . . . . Payment of a license fee entitles the number of covered workstations to unlimited use

of the software product . . . ." Only when the contracting officer called SMS to confirm that server licenses could be purchased on the same terms, and SMS replied that use of the term "work station" was an error because it intended to license software per user, did SMS give the contracting officer any reason to question the technical compliance of its licensing scheme. It confirmed this "clarification" of its BAFO in a December 15, 1989 letter to the contracting officer: "The software licensing prices are based on the number of users per system, not the number of CPU's [central processing units]." By thus switching to a user-based scheme that contemplated only the number of simultaneous users specified for the benchmark, SMS rendered its proposal technically unacceptable.

C. The Benchmark

We already have noted how the board ignored or minimized solicitation language limiting the role of the benchmark to technical demonstration and cost evaluation. Thus, how the terms "user" and "workstation" are employed in the benchmark is not intended to control their meaning throughout the solicitation and in SMS's proposals. We add that, even in the context of the benchmark, the solicitation did not equate or interchange the terms "user" and "workstation." It merely provided that, for the purposes of the benchmark, "a single, unique user must be *assigned to and logged into* each WS." That is another matter entirely. As in the rest of the solicitation, in the benchmark the term "workstation" is generally used in its technical sense -- to describe a com-

putational processor together with a graphics display, keyboard, and mouse -- making substitution of the term "user" nonsensical.

The board misinterpreted the benchmark in another way as well. It concluded that, since the benchmark allowed vendors to split the *processing* of required relational database management systems (RDBMSs) between workstations and one or more servers, the solicitation could not prohibit the split *licensing* of database software as in SMS's front-end back-end Licensing scheme. 90-2 B.C.A. ¶ 22,799 at 114,491. The board found support for this non-sequitur in the testimony of Data General's expert, who averred it would be "incredibly stupid" to run RDBMS "back-ends" (i.e., the back-end portion of the software) on diskless workstations.

Id. at 114,497. Of course it would be. The agency had no intention of doing so. Again the board ignored the solicitation's emphasis on flexibility in configuring individual systems. It also ignored the detailed and uncontroverted testimony of WRD employee Harbaugh, who repeatedly offered reasons for adding the necessary disks (i.e., memory) to workstations and running entire database programs on them, without the aid of servers:

> Q: can you explain to me why it is that your division requires the whole [database] package, both [front-end and back-end]?
>
> A: Databases are part of many of our applications. I mentioned my specialty of ground water modeling. Well, the ground water model is simulating the earth, a big chunk of the earth. You have a grid and for each grid point you have to have a data value. We store this data in the database and you have to retrieve data from that database. So we can't accept

having only a fraction of our computer power which is represented by that database server as the only computer power available to store and retrieve data in the database system. We need to distribute the server part of the database function among many processors and [there is] a good chance on our systems we would really be running that server process on all of the work stations.

* * * *

Q: Can you think of any reasons why the government would want to use the back end of that software product on the work stations, as opposed to the servers?

A: Certainly. There are a variety of different scenarios where that could occur. . . . [O]ne situation certainly would be if they had a desire to have a work station set up that wasn't connected to any other machine, a stand-alone work station, such as you might provide a programmer or somebody like that.

Another situation would be if you had large numbers of databases which were sizeable and which were not shared by large numbers of people. Okay.

> For example, a scientist working on a research project involving a large number of data observations or data points, as you call them.
>
> In that kind of a situation, if you had any substantial number of those people doing that across a network, I think you would have some real performance problems. And clearly, if you had the opportunity and flexibility to run that application on the scientist's work station, you would most likely do it.

In the DIS II procurement, the government retained precisely the type of flexibility to which Harbaugh refers. Of particular relevance to the cited passage is the board's observation that "there is no *requirement* for standalone work stations." 90-2 B.C.A. ¶ 22,799, at 114,497. That is true, but the agency certainly reserved the right under the solicitation to order stand alone workstations for those situations described by Harbaugh.

The board's independent assessment of whether the agency would or should do so is irrelevant.

It is also illegal, at least to the extent it infected the board's analysis of both the solicitation and the technical compliance of SMS's offer. Section 759(e) of the Brooks Act specifically prohibits the board from imposing on the agency its own views of the agency's data processing needs:

> The authority conferred upon the Administrator [of the General Services Administration] . . . by this section . . . shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the types and configurations of equipment needed.

40 U.S.C. § 759(e) (1988). Yet this is precisely what happened here. The board

did not give terms either in the solicitation or in SMS's proposal their plain and unambiguous meaning, because to do so would have obligated the agency to purchase, and the successful offeror to provide, more expansive software licenses than the board thought necessary to meet the agency's needs. It said,

> We believe that [USGS] should reconsider whether it really wants to be charged the inevitable higher prices for something -- unlimited simultaneous use of software packages -- which, in effect, it admits in its solicitation it will rarely if ever need. * * * We reach a similar conclusion with regard to the use of front-end and back-end software. * * * SMS has made a convincing case for questioning whether as a practical matter it makes sense to have or pay for a complete database package resident on the 5,185 work stations in the cost model, most of which are diskless. Wouldn't it truly be "incredibly stupid" to run RDBMS back-ends on diskless work stations . . .?

90-2 B.C.A. ¶ 22,799, at 114,497. Accordingly, the board ordered the agency, "if it intends to procure these requirements, to amend the solicitation to reflect its true software licensing requirements . . . ." *Id.* at 114,498. "Stupid" or not, the board has no warrant to question the agency's judgment or to revise its delegation of procurement authority to ensure that the agency's assessment of its "true" needs is in harmony with the board's. The board has neither the authority nor the expertise to second-guess the agency.

Conclusion

Accordingly, the decision of the board is reversed and the award to Data General is reinstated.

REVERSED

BOARD OF CONTRACT APPEALS
GENERAL SERVICES ADMINISTRATION
WASHINGTON, D.C. 20405

March 15, 1990

PROTESTS OF SMS DATA PRODUCTS GROUP, INC.
and LOCKHEED MISSILES & SPACE COMPANY, INC.

Nos. 10468-P, 10474-P

Opinion by Administrative Judge LaBella

SMS Data Products Group, Inc. (SMS) and Lockheed Missiles & Space Company, Inc. (Lockheed), protest the award of a contract for the DIS II Microprocessor System by the United States Department of Interior, United States Geological Survey (USGS), respondent, to Data General Corporation (Data General), an intervenor in these proceedings. SMS contends that respondent erroneously rejected its best and final offer (BAFO) as offering unacceptable software licenses (SMS based its licenses on the number of simultaneous users on a system and it proposed and

priced applications software that operates with a front-end and back-end approach) and unbalanced pricing, in favor of an allegedly higher priced offer by Data General. Lockheed argues that deficiencies regarding mandatory solicitation requirements exist in both the Data General and SMS proposals and that respondent should now proceed with an evaluation of Lockheed's proposal or amend the solicitation to reflect its true requirements which it assumes are represented by the Data General proposal. These protests were consolidated pursuant to Rule 26, and on January 22, 1990, we dismissed a portion of Lockheed's protest. A hearing was held and posthearing briefs were received from all parties. Because we find merit to SMS's protest, respondent, if it intends to procure these requirements, must

amend the solicitation to reflect its true software licensing requirements and conduct further discussions with the offerors, and make award on the basis of revised BAFOs.

Findings of Fact

This procurement was initiated to acquire hardware, software, and services to replace respondent's Water Resources Division's (WRD's) Distributed Information System (DIS). This division is the principal Federal water-data agency and is heavily dependent on information systems resources for fulfilling its mission. Residing within DIS or accessible through the network are data bases of national scope which are primary to the mission of WRD. It has slightly more than 4,000 employees, most of whom have access to a terminal under DIS. District offices

range in size from 40 to 100 people. Sub-district and other field offices range in size from two - three to seventy (more often from seven - ten to twenty-five) people. DIS is used to acquire, process, and store hydrologic data in geographic information systems; to prepare and publish reports; and to support administrative applications such as payroll, procurement, office automation, and financial management. Protest File, Exhibit 29 at 000884, -884.01, -885, -885.01, 001289.[1/]

Respondent seeks to acquire new computer technology for an estimated 216 WRD office locations around the country as well as optional quantities for inter-

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[1/] In referring to the protest file throughout this decision we include references to the Bates numbering system employed by SMS in the copy it provided the Board at the hearing.

divisional use at approximately fifty-one additional locations. The solicitation contains Table C-1, which shows individual site locations, the estimated initial system level for each location, the anticipated delivery schedule -- at months one, thirteen, twenty-five, and thirty-seven -- and the estimated upgrade system levels during the contract life. Id. at 000887. Four system levels (referred to as L configurations L-1 through L-4, respectively providing five, fifteen, thirty, or sixty work stations) are identified solely for benchmarking, informational and evaluation purposes. At the preproposal conference respondent's representative explained that "[t]he system levels differ in the number of users supported and in the workload that each level will be tested with." Id. at 001312. In response to a direct ques-

tion regarding the number of users in Level 1, respondent's response was "[t]here are five users in Level 1." Id. at 001301. Any item offered in the DIS II procurement may be ordered separately for any system at any location because each location will have a unique configuration notwithstanding the designation in Table C-1 of a particular L configuration for each location, thus providing for flexibility in configuring the initial installation and subsequent system upgrades. The various system levels are explained in the specification as follows:

> C.2.2. The following four system levels are defined for evaluation purposes:
>
> C.2.2.1. Level one (L1) is the smallest in terms of number of users, work load requirement, anticipated data base size and telecommunications activity.

> C.2.2.2. Level two (L2) has approximately three times the number of WSs [work stations] and five times the L1 work load requirement.
>
> C.2.2.3. Level three (L3) has approximately six times the number of WSs and 10 times the L1 work load requirement.
>
> C.2.2.4. Level four (L4) has approximately 12 times the number of WSs and 25 times the work load requirement of L1.

Protest File, Exhibit 29 at 000890.

The solicitation defined the term "system" to mean the "total complement of hardware and software acquired under this contract for one location." Id. at 001018. New, technologically advanced systems were required under the specifications.

> C.1.4.3. With respect to the new technology, a "system" is defined as the total complement of hardware and software acquired for one location. A system will change through the life of the contract as the complement of components at a

location are modified. A new system shall operate functionally as if it were a single computer even though it will consist of multiple computers.

C.1.4.4. Individual systems will be custom-configured by the Government at the time each is purchased. The Contractor shall provide four system levels (for the purpose of cost evaluation and testing), each of which shall have passed a benchmark. Each system level shall provide the same functionality and execute the same software. The four system levels differ in the number of users that will be supported and the computational demands of the work load. Many of the contract requirements are specified in relation to these four system levels.

C.1.4.4.1. A system shall include computational work stations, each having a graphics display, keyboard, and mouse. Most users of a system will ultimately have their own work station (WS) in their own office. Additional processors serving such functions as computational servers and file servers may also be included in a system. All WSs and other system processors shall run the UNIX operating system.

C.1.4.4.2. The Contractor can design the configuration of the four benchmarked system levels to optimize performance/cost ratios. For exam-

ple, all processing might be done on WSs, or a system might include one or more compute servers that do part of the processing.

Id. at 000886.

The systems to be acquired were to have many capabilities including the following with relevance to this protest:

> C.1.4.6.1. Process information from a system's WSs which are interconnected by the system's Local Area Network (LAN).
>
> C.1.4.6.2. Process information within the system from interactive "dumb" terminals (IDTs) that connect to the system through asynchronous ports, either directly or with modems.
>
> . . . .
>
> C.1.4.6.4. Process information on systems acquired under this contract that are remotely located, in a WAN [wide area network] environment using CCITT X.25 packet- switched network hardware and software, from IDTs connected to the local system.

Id. at 000886.01.

IDTs were not to be acquired under the contract and, thus, by definition were neither a part of any system to be acquired nor a part of any cost model established by the solicitation. Transcript at 33. Work stations, however, were to have at least two asynchronous communications ports to which IDTs or other devices might be attached. Protest File, Exhibit 29 at 000894.01, 000896.01, 001492.

The solicitation's technical criteria were evaluated basically on a pass/fail basis. If an offeror passed both the document evaluation and the benchmark, it received 1,000 points. An additional 200 points were allotted for evaluated optional features. Protest File, Exhibit 29 at 001009. Prior to negotiations, both Lockheed and SMS scored the full 1,200 points, and Data General scored 1,190

points. During negotiation, each offeror was told that all offerors had been determined to be essentially technically equal and that price would be the determining factor for award. Transcript at 31.

The offerors' software licenses

SMS points out that it is the IDTs which may be attached to these asynchronous communications ports, and remote users which may log in to a system through respondent's packet-switched telecommunications network, that lie at the heart of respondent's position that SMS's software pricing, based as it is on the number of simultaneous users on a system, violates the solicitation requirement for an "unlimited" software license. SMS believes that merely because the hardware proposed had to be capable of accommodating additional simultaneous users does not mean

that beyond that technical capability, the competition included this indeterminate body of additional simultaneous users. With respect to software licensing, the solicitation required:

> C.3.3.3. Software accessibility and licensing
>
> C.3.3.3.1. The users of a system generally perform a wide variety of tasks from their own WS. Users shall be able to execute software on any processor that is part of the system in order to optimize performance of the system.
>
> C.3.3.3.2. All software procured from the Contractor for a system shall be usable by a user on any WS on the system.
>
> C.3.3.3.3. All software procured from the Contractor for a system shall be usable by a user on any IDT on the system provided that the software does not require an integrated color graphics display as specified in paragraph C.3.2.6.2.
>
> C.3.3.3.4. All software acquired under this contract shall be executable on any processor on the system.

> C.3.3.3.5. The Contractor shall provide an unlimited license for software use for any software procured. This means all users of the system are allowed to execute the software simultaneously and the software may be executed on all processors that are part of the system. Although unlimited use site licenses are required, the computer systems shall be used for general purpose computing. It is unlikely that a high percentage of users shall be using any one package simultaneously.
>
> C.3.3.3.6. The Contractor shall provide a license to use the software for as long as the equipment is used by the Government (even if the update subscription is no longer in effect).

Id. at 000921, -922.

Offerors were expressly permitted to "propose various types of license arrangements, whichever is most cost-effective, as long as the requirements of paragraph C.3.3.3. are met." Id. at 001001.02. Vendor questions and respondent's answers

were incorporated into the solicitation by amendment. The following question concerns the issue of software licensing:

> Q: 83. C.3.3.3.5., p. C-68, and Table C-1, pp. C-10 through -16: This section states that "unlimited use site licenses are required." Please define "site licenses." For example, if three L2 systems are installed at the Reston facility, does one license apply to all three systems or to just one system? If it applies to all three, does it apply to all systems located at the Reston facility, even those already in place or provided through other contracts? Can we assume that all 267 locations listed in Table C-1 are separate and distinct locations for the purposed [sic] of site licensing? Can there be a scaled price for licenses, i.e. $1,000 for up to 10 work stations, $1,200 for up to 20 work stations, etc.?
>
> A: 83. One site license will apply to each system. If there are multiple systems at the same physical location (that is, within the same building), then there is still one license for each system. A system cannot extend beyond one building. The system to which a component from the contract belongs will be

specified when a component is ordered. It is likely that the larger offices will have multiple systems in the same building as indicated in Table C-1, but until details are known about proposed systems, there is no way for the Government to know the optimal way to construct systems in such offices. That is, at the Reston location, one large system could be constructed rather than the 3 systems indicated in Table C-1. For the purpose of cost evaluations, systems will be as defined in Table C-1.

The pricing of software licenses could well be a factor in determining how the Government designs systems within the same building. Technical factors will also be important in how systems are designed, e.g. system administration issues and Local Area Network operation. Paragraph (iv), page L-148 in the RFP states, "Offerors may propose various types of license arrangements, whichever is most cost-effective, as long as the requirements of C.3.3.3. are met." However, the Government may reject proposals where pricing is unbalanced.

In no case will software licenses under this Solicitation

> apply to equipment purchased separately.

Id. at 001401, -402. This answer is especially pertinent to the question whether SMS's method of pricing its software licenses based on the number of simultaneous users in a system met the requirement in C.3.3.3.5. for "an unlimited license for software." Question 83 sought information as to how respondent defined "site licenses" and we think it is significant that respondent permits a restrictive definition limited to the particular system being purchased irrespective of the number of systems at any one geographical location. This answer taken together with respondent's implicit approval of scaled prices for licenses, "i.e. $ 1,000 for up to 10 work stations, $1,200 for up to 20 work stations, etc.," would lead the reasonable offeror to believe that licenses

based on the number of simultaneous users on a "system" -- "total complement of hardware and software acquired under this contract for one location" -- would comply with the requirements of C.3.3.3.5.

This understanding is confirmed by a subsequent question and answer series also incorporated into the solicitation:

> Q: 7. Page C-68, Paragraph C.3.3.3.5.: AT&T UNIX licenses are granted based upon the number of users on a specific processor. We are forbidden from offering an UNIX site license. Additionally, we are perplexed on how to price non-UNIX software to meet this requirement. Do we bid the total cost for site licenses as a charge assessed with the delivery of the first system to a site? Should we price software on a per system basis? As worded, the Government may not receive proposals for software on a stand-alone work station. We suggest that the Government purchase a full right-to-use license for all software on each processor delivered. This will accomplish the Government's objectives as stated in the

requirement, allow the Government greater configuration flexibility, eliminate AT&T restriction, and allow vendors to obtain and submit pricing that is more in line with commercial practice.

A: 7. The present wording in the requirement does not preclude offerors from proposing software licensing as suggested in the question. The current requirement uses the term "unlimited license" rather than the term "site license" that is stated in the question. It is apparent that the terminology used by vendors to describe software licenses is not standard. The current requirement attempts to define what is desired--". . . all users of the system are allowed to execute the software simultaneously and the software may be executed on all processors that are part of the system." As the question indicates, software pricing is an important part of a proposal. Page L-148, paragraph (iv) states, "Offerors may propose various types of license arrangements, whatever is most cost effective, as long as the requirements of paragraph C.3.3.3. are met."

Id. at 001415. Without revealing more of the details of SMS's software pricing scheme because of the procurement sensitive nature of that information, we are satisfied that there was no material change from SMS's initial price proposal to SMS's BAFO price proposal with regard to basing licenses on the number of simultaneous users on a system and that there is no quantity cap on the ranges of software licenses offered by SMS. Protest File, Exhibit 10 at 000418-419; Transcript at 103. Although this scheme may not have been understood as such by the contracting officer on the basis of SMS's initial proposal and was perceived as a change upon consideration of SMS's BAFO, this misunderstanding is plausible given the imprecise use of the words "users" and

"work stations" and the greater detail contained in the BAFO.

With regard to the issue of user-based licenses, we further note that Lockheed's BAFO proposed licensing on the basis of scaled pricing. This illustrates that it too did not interpret the specifications as precluding user-based pricing. Protest File, Exhibits 28 at 000880 and 37 at 002970.

In addition to pricing its software on the basis of the number of system users, SMS priced certain software on the basis of operating it with a front-end and back-end approach. Respondent rejected as unacceptable SMS's separate pricing for front-end and back-end on the basis that this methodology failed to permit simultaneous use of both front-end and back-end software on all processors for all system

users. We note that all three offerors split their RDBMS applications during the benchmarks into a back-end running on a server and front-ends running on work stations. Transcript at 47. Lockheed also proposed certain software on a per server basis and licensed fewer software packages than there are processors. Protest File, Exhibit 37 (compare CLIN 5302A, at 002982, 002988, with CLIN 5314AAB, at 002984, 002990). Even though Data General did not separately price its software -- presumably it bundled its "N/C" (no charge) for software contract line item numbers (CLINs) into its hardware prices -- one can only reasonably conclude that Data General's bundled prices did not allow for licenses for front-end use of back-end software and vice versa. This is because Data General proposed to use a

dedicated server, it separately listed software server only licenses and work station only licenses in its proposal in insufficient quantities to cover all processors, and it benchmarked its software by running back-end on the servers and front-end on the work stations. Protest File, Exhibit 4 at 000277; Transcript at 51, 52, 58. The contracting officer, however, testified that Data General's software packages listed in its proposal as "Work station License Only" could nevertheless be ordered for the servers because Data General's cover letter states that "Each desired individual software package should be indicated on the delivery order by its associated contract Line Item Number (one copy per work station or server) at 'N/C' (no charge)." Transcript at 60, 64, 65; Protest File, Exhibit 18 at

000614. We disagree with the contracting officer's interpretation of Data General's cover letter because this letter references CLINs limited only to work stations which are not intended to cover servers.

SMS believed that the distributed processing architecture permitted by the solicitation allowed for the distribution of tasks among the processors within a system in that additional processors serving such functions as computational servers and file servers were permitted. Transcript at 210-11. Based on this understanding, SMS also proposed, and similarly priced, certain applications software that operates with a front-end and back-end approach. In this connection, the solicitation's benchmark provisions stated:

> 5.2.5.6. Although the application type shell programs must run on the user's assigned WS, tasks within these shell pro-

> grams may execute on any system level processor as long as input originates from the user's assigned WS and the display output goes to the display on the user's assigned WS . . . .

Id. at 001069, 001261, 001332. Distribution of tasks among processors within a system was also discussed at the preproposal benchmark conference. The Government representative stated:

> The benchmarks for different system levels vary only in the number of users running the applications and the difficulty of the work done. Each benchmark user submits tasks from a single work station. However, as long as interactive input comes from a user's work station and display output goes to that station, the task can be executed on any system processor.

Id. at 001370.

The posthearing brief submitted by SMS provides an excellent perspective regarding the practicality of this techni-

cal matter and how this worked its way into its proposal:

> SMS proposed applications software that operates with a front-end approach in much the same manner as the operating system software provides mass storage to diskless work stations. In particular, SMS proposed a relational database management system (RDBMS) application that operates using front-end and back-end components. With an RDBMS application, this type of approach is much more efficient in terms of using system resources: the basic problem is that an RDBMS may well have to search large amounts of data stored on disk to provide a relatively simple answer, and thus a single query might require searching several hundreds of megabytes of disk data. Even at ten megabits per second, the Ethernet LAN pathway is considerably slower than the pathway from a locally-attached disk to the dynamic memory of a diskful work station or diskful server, and thus software running on the diskful server or diskful work station can search data much more rapidly than software that can access mass storage only through the network.

> When a front-end, back-end approach is employed for an RDBMS, the front-end running on the diskless work station can accept the query and transmit that relatively compact packet of information through the network to the RDBMS back-end running in dynamic memory on a diskful work station or diskful server. The RDBMS back-end then transfers the answer, again, a relatively compact packet of information, through the network to the diskless work station, where it is displayed for the user. This approach improves response times and minimizes the use of network bandwidth. Transcript at 217-20. Using diskless work stations in a LAN of the sort required by this solicitation is a way to offer lower prices and is a common solution. Transcript at 827-30. It would be "incredibly stupid" to run RDBMS back-ends on each diskless work station, rather than on a diskful work station or diskful server. Transcript at 833-34.

In its initial technical proposal, SMS described the system licenses it was offering for software:

> Every work station of every system is equipped with a full suite of systems and application

> software. SMS has negotiated licensing agreements with the vendors of all proposed applications software packages to ensure that work station users are never denied access to any package based on licensing restrictions. For example, an L1 (5-user) system will be delivered with the ability for every software package to be in use at five seats simultaneously, and an L4 (60-user) system will be delivered with the ability for 60 persons to be using every software package simultaneously. There are not actually 60 copies of an application in an L4 system, of course; the executable program resides on (at most) each cluster server and is shared by all system users.
>
> All proposed software packages are identical at the binary executable code and data level, across all work station platforms. Thus, there is only a single copy of FrameMaker, for example, on any given system. Difference among systems are [sic] confined solely to the licensing arena, where an L1 system will not be licensed for as many simultaneous users as will an L2, L3, or L4.

SMS Exhibit 1 (emphasis added); Transcript at 229-30.

SMS's initial technical proposal further provided:

> C.3.3.3.1. SMS is proposing a fully binary-compatible solution to address this requirement. Every proposed software package can be executed on every proposed processor.
>
> C.3.3.3.3. There are no licensing restrictions on use of software from IDTs by system users.
>
> C.3.3.3.4. Any software procured for a system may be executed on any processor or combination of processors within that system.
>
> C.3.3.3.5. SMS has negotiated agreements with all system and applications software suppliers to ensure that all users of a system will be able to execute all software simultaneously.

Configuration	No. of Processors with Licensing	Description
L1	5	Level 1
L2	15	Level 2
L3	30	Level 3
L4	60	Level 4
UL2	10	Upgrade to L2 from L1
UL3	15	Upgrade to L3 from L2
UL4	30	Upgrade to L4 from L3

Protest File, Exhibit 17 at 000601-603.

Although SMS's proposed response to C.3.3.3.5. listed numbers of "processors" with licensing, this was an obvious error because for certain L configurations SMS had proposed more processors than work stations and because it was clear from SMS's proposal that this response was intended to refer to the number of system users for the respective configuration and that any software could be executed on any processor within that particular system configuration. Transcript at 231-32, 272-73. Moreover, the solicitation used the words "users" and "work stations" interchangeably, and SMS also did, even though there are places in SMS's responses where direct substitution of one word for the other would not make semantic sense. Transcript at 259-64, 288-89, 347-49. The

solicitation's imprecise use of the word "users" versus "work stations" in the context of software licensing probably stems from common industry practice in using the terms interchangeably in other contexts. Indeed, Lockheed has used the two terms interchangeably and recognizes that the industry does as well. Transcript at 525.

The unbalanced pricing issue

SMS submitted the lowest price under the solicitation's systems life cost model required by Federal Information Resources Management Regulation (FIRMR) § 201-32.205-3. Transcript at 32, 89-91, 395. That model considered all option years and quantities for the express purpose of preventing a buy-in. Transcript at 91, 92. Under this cost model SMS became the low offeror relatively early in the

eighty-four month systems life. Transcript at 87.

As explained at hearing, the contracting officer rejected SMS's proposal as unbalanced because, in general, its hardware prices went down and some software prices went up each year. Respondent's Posthearing Brief at 25. Respondent further suggests that SMS intends to propose technological upgrades to its hardware in the out years and that this will permit SMS to increase significantly the proceeds indirectly flowing out of the DIS II contract. The only basis for this belief seems to be that SMS has offered hardware based upon technology that currently is not the most advanced. This basis, however, provides no support for respondent's conjectural criticism for the simple and obvious reason that the tech-

nology offered by SMS was evaluated to be acceptable under the specifications and evaluation criteria. Indeed, SMS's proposal received the maximum technical score. Finally, respondent suggests that SMS's offer was front-loaded to take advantage of probable early buying trends of the Government.

In this connection, SMS points out that the decreases in SMS's hardware prices occur in conjunction with large increases in the quantities under the cost model -- 630 work stations to be purchased in the first year and 2,325 work stations to be purchased in the second year. Transcript at 84; Protest File, Exhibit 6 at 000308 and 29 at 000887 -890. Although SMS's prices for some software packages increase in the out years, they do not

exceed current GSA schedule contract prices. Transcript at 311-14.

"Availability" requirement

Lockheed raises the issue of whether the solicitation's requirements in Paragraphs H.7 and L.20 were misinterpreted and misapplied by respondent to Lockheed's prejudice. Paragraph H.7, entitled "Availability of Hardware and Software," required: "The items provided hereunder must have been in production and delivered on or before the start of the benchmark period. (See Paragraph L.20)." Protest File, Exhibit 29 at 000967. Paragraph L.20, entitled "Benchmark," sets forth certain requirements for the benchmark and for the test and evaluation of newly developed "features" of the proposed software and hardware. It states that:

> (a) The Government will require all offerors to perform

a benchmark (performance and functional demonstration), after it is determined that the proposal passes all other technical requirements. This benchmark will show that the equipment and software can perform in accordance with the requirements set forth in Section C. . . .

(b) Pursuant to paragraph H.7., items proposed must be in production and delivered prior to the start of the benchmark period. If a hardware or software feature is developed but not actually delivered by this time, and if the benchmark tests do not cover this particular feature, the offeror will be required to demonstrate the capability, with his own live test demonstration (LTD) materials. Any/all LTD's required must be run within the time period allotted for the benchmark.

(c) Additionally, any technical capabilities, whether mandatory or evaluated optional features, that cannot be adequately described by the Offeror in the technical proposal may be subject to the provisions of paragraph (b) above.

Protest File, Exhibit 29 at 001007-008.

The facts relevant to this issue are well presented in Lockheed's posthearing brief:

> . . . . The contracting officer's position is that H.7 requires only that the software packages had to have been currently produced on the assembly line and sold to some party other than USGS. [Transcript at 465]. In contrast, Lockheed read the clause . . . to require that the software packages have previously been "ported" on the proposed hardware platform and sold in the marketplace prior to the start of the benchmark period. The contract was awarded based on Data General's proposal for several software packages that had not been ported on the proposed hardware prior to the start of the benchmark period and sold in the marketplace. Protest File, Exhibit 103 at 3, 4, 6 (INGRES, FrameMaker, and Statit "first customer ship" on AViiON December 28, November 30, and October 30, 1989, respectively).
>
> In rejecting Lockheed's interpretation of H.7 and L.20, the [G]overnment's position at the hearing was that H.7 and L.20 were included in the Solicitation <u>solely</u> as cost-cutting

> measures for the [G]overnment "to avoid software vendors . . . custom-writing software to meet our specifications." [Transcript at 463-64.] Consequently, according to the [G]overnment, offerors were not expected to understand H.7 as a provision to reduce the [G]overnment's technical risk through previous porting of hardware and software and sale to the marketplace.

Lockheed's Posthearing Brief at 15, 16.

Porting of ARC/INFO, NETWORK and TIN

Lockheed alleges that respondent awarded the contract to Data General knowing, or having reason to know, that Data General could not satisfy the postaward benchmark test regarding the porting of ARC/INFO, NETWORK and TIN. In our interlocutory decision in this matter we defined this issue as the "state of [the contracting officer's] knowledge at the time of award as to whether Data General could meet a mandatory capability require-

ment." As initially issued the solicitation required offerors to demonstrate during the preaward benchmark the ability to run the ARC/INFO software package, which is a proprietary product sold by Environmental Systems Research Institute, Inc. (ESRI). This requirement subsequently was replaced with a requirement that the apparent awardee, prior to award, submit to the contracting officer a copy of a porting agreement between the offeror and ESRI. Protest File, Exhibit 29 at 001446; Transcript at 434. This solicitation amendment also required that "prior to acceptance of any work station or system, the contractor will be required to successfully run the entire benchmark test." Protest File, Exhibit 29 at 001445.

The testimony at hearing established that the contracting officer set no specific date by which the port had to be completed. Transcript at 438. The first deliveries under the contract would occur no sooner than 90 days after the first order was placed. Id. at 458. The contracting officer testified that she was aware that ARC/INFO already ran on a UNIX platform and she had been given reason to believe that porting from one UNIX platform to another was not very difficult. Id. at 454. The contracting officer also knew that Data General was working with ESRI on this matter. Most important, ESRI wrote the contracting officer to advise that:

> The port [of ESRI's ARC/INFO, NETWORK, and TIN] will be a joint effort between ESRI and DGC. Preliminary work on the port has already commenced with the intent of the parties to

have the ports completed at the earliest possible dates.

Protest File, Exhibit 12.

Compliance of Data General's software packages

RDBMS - ANSI language

Data General proposed INGRES 5.0/06 (INGRES) software packages to meet the solicitation's RDBMS mandatory requirements. Lockheed contends that this product fails to meet the specification requirement "to meet or exceed the ANSI Data Base Languages - SQL (X3.135-1986) level 2 requirements." Id. at 000900.01, ¶ C.3.3.2.2.1.7. Lockheed's expert witness testified that INGRES does not implement thirty-seven words in the ninety-four-word vocabulary defined by the ANSI standard for the language. Transcript at 576. Respondent's principal technical evaluator testified that a strict construction of

the more than 100 guidelines of ANSI, as opposed to overall ANSI SQL compatibility, was neither intended to be, nor was, the most reasonable interpretation of the solicitation. Id. at 489. While there exists a FIPS 127 standard which is a certification procedure that provides a precise measurement of compliance, this was not specified. Id. at 795-800. Data General's expert witness took issue with Lockheed's expert's strict construction of the ANSI requirement and testified that none of the database management packages proposed complies with the requirement 100 percent. Id. at 797, 801. This analysis of the database management packages was not disputed or disproved.

In addition, INGRES does not contain precisely the same features that are in the ANSI standard. For example, Lockheed's

witness explained the absence of "NULL values" to illustrate that INGRES does not have precisely the same functionality as provided by "NULL values" while recognizing a substituted functionality does exist. A "NULL value" is a value used in the database where the actual data value is not known -- in other words, the data is missing. While Lockheed's expert testified that INGRES does not have a "NULL value" feature, Transcript at 580-83, Data General's expert testified that INGRES permits an equivalent feature, i.e., the addition of a column to the relevant database table, a solution which is implemented entirely in the SQL language. Id. at 803.

RDBMS - Distributed capability and multi-node update requirements

Lockheed contends that INGRES does not comply with the requirement in ¶ C.3.3.2.2.1.8. that:

> The RDBMS shall provide a distributed capability. This capability can make physically distributed data bases on the same system appear as one data base. The capability for multi-node update, query, deletion and retrieval on all magnetic disks on a system shall be provided.

Protest File, Exhibit 29 at 000900.01. Lockheed points out that the INGRES 5.0 documentation specifically states that multi-node update is not supported. Protest File, Exhibit 116 at 5-5. Data General's expert testified that Lockheed has inferred a requirement not present in the language of the clause -- namely, that referential integrity be maintained during multi-node updates. In his opinion the only requirement is that the software make

physically distributed data bases on the same system appear as one data base, a feature that was demonstrated at the benchmark. Transcript at 804-06. Lockheed does not challenge Data General's representation that the feature, as described by its expert, was in fact tested at the benchmark and found to exist notwithstanding the contrary indication in the documentation and we find as fact that it was.

RDBMS - Relationship integrity

Lockheed contends that INGRES does not satisfy the requirements of specification paragraph C.3.3.2.2.10.5. that the RDBMS:

> Maintain relationship integrity such that the integrity of all one-to-one and one-to-many relationships is automatically enforced.

Protest File, Exhibit 29 at 000904. Lockheed contends that this is a sophisticated feature requiring special database procedures. Transcript at 605-08. The paragraph in issue, however, is a subsection of ¶ C.3.3.2.2.10., prescribing "maintenance requirements," but Lockheed's expert discussed this requirement in the context of examples that were unrelated to maintenance. The testimony of Data General's expert, with which we agree, is that the true purpose of this provision is to require that when data is being unloaded, reloaded, or compressed, the relationship integrity be maintained so that the tables do not get disconnected from one another. Transcript at 817-18. In this context, INGRES meets the requirement. Id. at 818.

RDBMS - Security by password

Lockheed states that INGRES does not comply with the requirement for "security by password," as required by specification paragraph C.3.3.2.2.11.1., which provides:

> Security by password is required such that individual users can selectively be given or denied permission to read, write, delete or modify the data base, files, records, and data elements. Security of data base and software should be independent of the host computer system. The file access security on a system is required to be identical to file access security of a WS.

Protest File, Exhibit 29 at 000904, emphasis supplied. Lockheed contends that INGRES uses the host computer system "user ID," but provides no prompt telling the user to enter a password. Transcript at 609-10. Data General reads this provision as requiring a mechanism to give individual users selective permissions to read,

write, delete or modify the data base, and the permissions granted must have security. Id. at 814. Its expert testified that the INGRES data base owner, via the permit command, could selectively grant the permissions required to the individual users. Once this was done, the individuals would then use their identification numbers to access the system, thus complying with the essential functionality of this requirement. Id. at 816. We agree that such an operation complies with this specification.

Statistical analysis software

Data General proposed Statit 2.2X to meet the more than seventy requirements of the solicitation for statistical software. Lockheed believes that this software package fails to meet specification (C.3.3.2.4.2.8.) requirement for this

software to "input and output . . . Lotus . . . data files" and that, Release 2.2X is essentially a custom release in violation of the solicitation's "availability" requirements discussed above. Id. at 623; Protest File, Exhibit 29 at 000905. On the former point, Lockheed refers us to a footnote in the Statit 2.2X Supplement Reference Manual which states that this capability is restricted to the I-80386 versions of Statit. Data General's expert, however, testified credibly that the footnote is misleading because the version to be provided on the AViiON platform offered by Data General was developed on the I-80386 and was the same I-80386 version compiled over to AViiON. Transcript at 819-20. As to the second point raised by Lockheed, the solicitation's availability requirements, and whether those re-

quirements apply to added features as well as to items, are explained above and will not be repeated here.

Electronic publishing software

Data General proposed FrameMaker 2.0 to meet the requirements of paragraph C.3.3.2.9.2.13., which requires "[l]ined-up text tables . . . with word wrap." Protest File, Exhibit 29 at 000911. Lockheed complains that several steps are required to achieve a document resembling a text table. Its expert interpreted the "word wrap" requirement to mean that the column layout must be done automatically while a user is typing text into the program, but admitted that this was implied in the "word wrap" requirement. Transcript at 630. Data General's expert explained that FrameMaker allows columns to be manipulated as graphic objects, the

way page layout is typically done in these kinds of packages. Id. at 822-23. We find that there is no requirement in the solicitation that lined-up text tables had to be done as an automatic feature of the software while editing the document, or by any means other than providing the appropriate commands to the computer program. We agree with Data General that the "word wrap" requirement refers to the display of the document and the printed product, not to an implied "automatic" feature.

Discussion

SMS was eliminated from the competition when after receipt of BAFOs the contracting officer called SMS for "clarification" of its software pricing. The contracting officer pointed out that SMS's software licenses did not match up with the number of work stations/processors in

each system in that licenses for servers were omitted. The contracting officer also pointed out that SMS did not provide a price for the back-end software to run on each work station. The contracting officer was told that SMS priced its software based on the number of simultaneous users on a system rather than to individual work stations. Payment of the license fee entitled the number of covered work stations/seats/users to unlimited use of the software products purchased. When the user capacity of a system is increased beyond the capacity currently licensed, a license upgrade was required to be ordered if the software residing on the system would be used. Protest File, Exhibits 9 at 000317-318 and 10 at 000319.

Respondent had interpreted SMS's initial proposal as offering unlimited

simultaneous user licenses for software and that the Government pay for such licenses for each processor purchased. As indicated in our findings of fact, respondent misconstrued the true nature of SMS's software licenses essentially because it did not pick up on the fact that SMS used the terms work stations, users, and seats interchangeably. Such usage is consistent with respondent's use of these terms in its request for information and solicitation and industry's use of the terms. Such vagueness, of course, inevitably resulted in a disconnect between SMS's offer and respondent's interpretations of its offer.

More to the point, however, we are unable to conclude that specification paragraph C.3.3.3. et seq. actually required software licensing for an unlimited

number of simultaneous users. At most the unlimited license described therein required only that "all users of the system [be] allowed to execute the software simultaneously." Nowhere does respondent require that a system to be purchased permit simultaneous use by an unlimited number of users. Such an interpretation runs contrary to the solicitation's definition of a system being limited to only the total complement of hardware and software acquired under the contract for one location. This reasonably may be construed as limiting use to the number of "seats" acquired for the system and excluding increased simultaneous usage attributable to IDTs to the extent such simultaneous use exceeds the total number of seats acquired for the system. Respondent's attempt to construe its require-

ments to allow for an unlimited number of simultaneous users is also counter-intuitive to the solicitation's underlying notion that offerors were permitted to propose various types of license arrangements, whichever is most cost-effective.

Thus we conclude that respondent violated the requirement in Federal Acquisition Regulation (FAR) § 15.610(c)(3), to resolve uncertainties concerning the technical proposal and other terms and conditions of the proposal, and may not now impose upon SMS or for that matter upon any other offeror a requirement for an open ended number of simultaneous users on each system to be acquired. Nor do we think, as explained in our findings of fact, that any other offeror proposed licenses on such a basis. The record

shows that Lockheed offered software on the basis of scaled prices, which, of course, inherently limits the number of simultaneous users on a system. Although Data General offered software, keyed into the acquisition of hardware, at no charge in addition to its hardware prices, we think respondent is required to take a quantum leap of faith to assume that Data General's not-separately-priced licenses offered simultaneous usage beyond the number of processors or work stations acquired for a given system. We are not willing to take that leap. Given the confusion which should have been apparent to respondent after receipt of BAFOs, the only reasonable course respondent could have taken to protect the Government's interests was to have reopened discussions on such a basic element of the acquisi-

tion. Under FAR § 15.611(c), "[a]fter receipt of best and final offers, the contracting officer should not reopen discussions unless it is clearly in the Government's interest to do so (e.g., it is clear that information available at that time is inadequate to reasonably justify contractor selection and award based on the best and final offers received)." The exception is precisely the situation that occurred in this case. We believe that respondent should reconsider whether it really wants to be charged the inevitable higher prices for something -- unlimited simultaneous use of software packages -- which, in effect, it admits in its solicitation it will rarely if ever need. If it truly believes such expansive licenses are necessary, it must revise its solicitation to require such licensing

terms and obtain revised best and final offers on such a basis.

We reach a similar conclusion with regard to the use of front-end and back-end software. Respondent hardly could reject only SMS without further discussions in this regard when at least two offerors proposed and all three benchmarked such a technique. Indeed, SMS has made a convincing case for questioning whether as a practical matter it makes sense to have or pay for a complete data-base package resident on the 5,185 work stations in the cost model, most of which are diskless. Wouldn't it truly be "incredibly stupid" to run RDBMS back-ends on diskless work stations, as testified by Data General's own expert? Transcript at 833-34. In any event, respondent may not reject such an approach as unacceptable on

the basis of the existing specifications because there is no requirement for standalone work stations and since everyone on a system can access the back-end at will. In other words, the back-end is usable in the sense of being accessible by a user from any work station on a system.

As to the rejection of SMS's proposal as unbalanced, the issue is partially mooted by the fact that we require respondent to revise its solicitation and obtain revised BAFOs. Nevertheless, the record contains sufficient evidence to determine that the contracting officer's rejection on this ground was erroneous. A contracting officer may reject a proposal if any imbalance in the pricing is material in that it will affect adversely the integrity of the competitive procurement system or make it impossible for the contracting

officer to be reasonably certain of the actual low-cost offeror. SMS Data Products, Inc., GSBCA No. 9834-P, 89-1 BCA ¶ 21,567, 1989 BPD ¶ 45. Imbalance becomes material per se, for example, in cases which involve extreme front-loading, and where the mathematically unbalanced bid does not become low until near the end of the final contract period. Id. These conditions simply did not occur in this case. The decreases in SMS's hardware prices are explained in that they occur in conjunction with large increases in the quantities under the systems life cost model required by FIRMR § 201-32.205-3. There is no evidence that any of SMS's prices are unreasonably high, and its software prices never exceed current GSA schedule prices. Most significant is the fact that under the cost model provided in

the solicitation and required by regulation SMS becomes the low offeror relatively early in the eighty-four month systems life. Although respondent seeks to adjust this evaluated cost figure by adding a factor to cover the cost of acquiring back-end software for front-end use, we do not credit this argument because we have concluded that respondent may not reject SMS's licensing approach without first revising its solicitation in this regard. We therefore conclude that respondent's determination to reject SMS's offer because of unbalanced pricing is improper.

Lockheed argues that the solicitation's "availability" requirement can reasonably be interpreted to require that proposed software packages previously have been "ported" on the proposed hardware platform. We disagree. The short answer

is that in the absence of a specific provision for such it would be unreasonable to apply the "availability" provision to combinations of items rather than to the individual line items. This is consistent with the rule that "in furtherance of the statutory direction that agencies state their requirements, to the extent possible, in terms which will permit a variety of products or services to qualify for award, we read solicitation requirements in the least restrictive manner possible given the situational context." Xerox Corp., GSBCA No. 9862, 89-2 BCA ¶ 108,922, 1989 BPD ¶ 68. Moreover, to the extent that Lockheed argues that Data General was required to have features, as opposed to items, developed and in production or to demonstrate them at the benchmark, as a matter of law we do not agree that the

"availability" provision in the solicitation applies to such features.

As to the requirement that an offeror submit prior to award the agreement between the offeror and ESRI for the porting of ARC/INFO, NETWORK, AND TIN software packages, we previously stated in our interlocutory decision that Lockheed should be permitted to show the state of respondent's knowledge at the time of award as to whether Data General could meet a mandatory capability requirement. Lockheed now argues that the contracting officer never made a proper evaluation because she never received the proof of compliance required by the solicitation. What the contracting officer received was a letter from ESRI, the software's producer, in which it committed itself to complete the ports at the earliest possible

dates and represented that a joint effort already had commenced. We think this letter from the producer of the software, as opposed to a self serving one from the offeror, taken together with the contracting officer's awareness that such software was ported on a UNIX platform, is sufficient to conclude that this definitive capability requirement was met. Whatever additional terms and conditions that might exist in the actual porting agreement between ESRI and Data General, they are superfluous to the evidence presented regarding ESRI's basic commitment to accomplish the port.

It is true, as Lockheed points out, that INGRES, Data General's RDBMS software package, contains less than all of the ANSI standard vocabulary. It is also true that the literal language of the specifi-

cations requires the RDBMS to meet or exceed the ANSI Data Base Languages - SQL level 2 requirements. We agree that on its face this requirement was not met. We ordinarily approach this sort of issue from the perspective that the Government should say what it means and be held to mean what it says. We are persuaded, however, by the expert testimony that none of the offerors so interpreted this requirement and that such an application with respect to this evolving standard would be inappropriate. Not only is complete compliance difficult but there are "over 50 software packages which offer SQL, no two of them are identical, none of them conform[s] to the standard, and in fact, when you even look at the IBM packages, Sequel and DB-2, they also speak different variations of SQL." Transcript

at 800. As to whether INGRES can perform the functionality of the "NULL value" feature, we have found as fact that INGRES provides an equivalent feature and we determine this to be sufficient compliance with the specification in these circumstances.

As to the remaining RDBMS requirements discussed in our findings of fact, i.e., distributed capability and multi-node update, relationship integrity, and security by password, we have concluded that, as a factual matter, INGRES complies with these requirements. Similarly, we determined as fact that Data General's statistical analysis software and its electronic publishing software both meet the specification in the elements challenged by Lockheed. Finally, we note that in its posthearing brief Lockheed for the

first time questions whether Data General violated the integrity of unit prices requirement of the solicitation and whether the contracting officer made an effort to evaluate compliance with this requirement. No mention of this issue was made in Lockheed's amended pleadings or in its prehearing brief. It is too late in the process for us to consider this issue now and it is dismissed.

Decision

For the reasons stated, we conclude that SMS was excluded improperly from the competition and we revise respondent's delegation of procurement authority to require respondent, if it intends to procure these requirements, to amend the solicitation to reflect its true software licensing requirements, conduct further discussions with the offerors, and obtain

revised BAFOs in accordance with the guidance provided in this opinion. The protest of SMS in GSBCA No. 10468, and to the extent that Lockheed eventually joined with SMs on the successful issues, is **granted**. Since we have rejected the issues raised by Lockheed in its separate protest docketed as GSBCA No. 10474, we **deny** that protest. The prior suspension of respondent's delegation of procurement authority lapses by its terms.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1264

DATA GENERAL CORPORATION,

Appellant,

v.

THE UNITED STATES,

Appellee,

and

SMS DATA PRODUCTS GROUP, INCORPORATED and LOCKHEED MISSILES & SPACE COMPANY, INC.,

Intervenors-Appellees.

O R D E R

O R D E R

Before MARKEY, Circuit Judge, MILLER, Senior Circuit Judge, and Mayer, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on November 13, 1990.

FOR THE COURT,
/s/_____
Francis X. Gindhart,
Clerk

Dated: November 6, 1990.

cc: RICHARD J. WEBBER, JOAN M. BERNOTT
CYRUS E PHILLIPS, E. SANDERSON HOE
CYRUS E. PHILLIPS, IV
E. SANDERSON HOE

DATA GEN CORP V US, 90-1264
(BCA - 104698-P)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1264

DATA GENERAL CORPORATION,

Appellant,

v.

THE UNITED STATES,

Appellee,

and

SMS DATA PRODUCTS GROUP, INCORPORATED and LOCKHEED MISSILES & SPACE COMPANY, INC.,

Intervenors-Appellees.

O R D E R

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,
/s/
Francis X. Gindhart,
Clerk

Dated: November 20, 1990

cc: RICHARD J. WEBBER, JOAN M. BERNOTT
CYRUS E PHILLIPS, E. SANDERSON HOE
CYRUS E. PHILLIPS, IV
E. SANDERSON HOE

DATA GEN CORP V US, 90-1264
(BCA - 104698-P)

No. 90-1232

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IN THE

Supreme Court of the United States

October Term, 1990

SMS DATA PRODUCTS GROUP, INC.,
Petitioner,

v.

THE UNITED STATES and
DATA GENERAL CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

Richard J. Webber
Counsel of Record

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6254

Counsel for Respondent
Data General Corporation

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTION PRESENTED

Whether the Federal Circuit correctly held that the General Services Administration Board of Contract Appeals ("Board") interpreted the software licensing specifications of the U.S. Department of Interior's Solicitation No. 7510 contrary to their plain meaning?

RULE 29.1 STATEMENT

Data General Corporation has no parent companies or subsidiaries (except wholly owned subsidiaries).

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THE UNITED STATES and
DATA GENERAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The pertinent facts are set forth in the Federal Circuit's decision. SMS' Petition, pp. 1a-16a.[1] Data General will respond here, however, to a number of inaccuracies in SMS' Statement of the Case.

On pages 7-8, SMS states that despite its being the lowest-priced offeror, the contracting officer disqualified its proposal because SMS had proposed licenses which restricted the number of users on the system. SMS was, in fact, found by

[1]Data General will refer to the Petition for Writ of Certiorari as "SMS' Petition." The Federal Circuit's decision is reproduced at pages 1a-39a of SMS' Petition.

the agency to be technically non-compliant for two reasons: (1) it restricted the number of users licensed on the system, and (2) it restricted the use of the back-end database software package to a small percentage of the processors on the system. SMS' Petition, pp. 10a-13a. In addition, as the Federal Circuit found, SMS did not offer the lowest price proposal. Because of SMS' restricted use licenses, the agency's additional costs of purchasing from SMS the additional software licenses needed made Data General's offer the low price. SMS' Petition, pp. 21a, 24a-25a.

On page 11 of SMS' Petition, SMS leaves a misimpression that Data General's expert described as "incredibly stupid" the USGS requirement that server software must be licensed to run on workstations. To the contrary, Data General's expert supported the agency's testimony that there was a need for the database back-end software to be licensed for all workstations, because the agency would likely purchase disks for those workstations to avoid bottlenecks in data processing. SMS' Petition, pp. 33a-36a. The expert's testimony, in response to a question by the SMS attorney, was that it would be "incredibly stupid" to run the back-end software on a *diskless* workstation. As the expert knew, the agency never had such an intent. *Id.*

SMS states that no party to the appeal challenged the Board's finding that none of the offerers had proposed unlimited use software licenses; SMS further contends that the Federal Circuit ignored that finding. SMS' Petition, pp. 12, 13. These contentions are simply untrue. In its Brief for Appellant to the Federal Circuit, Data General challenged at length the Board's erroneous conclusion that Data General had not proposed unlimited use site licenses. Brief for Appellant, pp. 31-34, 44-46. Data General showed that the Board's contrary conclusion was based on its misinterpre-

tation of the language of the solicitation; the same misinterpretation by the Board was applied to Data General's proposal. *Id.* Moreover, the Federal Circuit rejected the Board's finding when it stated that Data General, SMS, and Lockheed had all submitted technically compliant proposals. SMS' Petition, p. 9a. To be technically compliant, Data General had to meet the software licensing requirements. Subsequently, only SMS changed its licensing provisions, rendering SMS' previously compliant proposal non-compliant. Indeed, once the Federal Circuit corrected the Board's interpretation of the solicitation's licensing requirements, the compliance of Data General's proposal was no longer an issue: Data General expressly stated in its proposal that it would provide the unlimited licenses required by the solicitation. Brief for Appellant, pp. 31-34.

On page 13 of SMS' Petition, SMS incorrectly states: "the [Federal Circuit] held that the *Board* had exceeded its jurisdiction by insisting that USGS clearly and unequivocally state its technical specifications." The Federal Circuit's holding was that the Board had erred as a matter of law in its interpretation of the solicitation's licensing provisions. The Federal Circuit added that to the extent the Board's misinterpretation of the solicitation resulted from the Board's substitution of its own views of the agency's automatic data processing needs, the Board had exceeded its statutory authority. SMS' Petition, pp. 37a-39a. Nowhere, contrary to SMS' assertion, did the Federal Circuit state that the Board had exceeded its jurisdiction by insisting that the agency state its technical requirements clearly.

REASONS FOR DENYING THE WRIT

The Federal Circuit's decision is based on an interpretation of the specific and unique provisions of Interior Depart-

ment Solicitation No. 7510 for automatic data processing systems, and an offeror's (SMS') proposal in response thereto.

In its attempt to make the case appear worthy of Supreme Court review, SMS has focused on a peripheral issue relating to the Board's jurisdiction, one which the Supreme Court would not find dispositive of the case. Moreover, SMS has framed that issue of the Board's jurisdiction — and the Federal Circuit's statements with regard thereto — inaccurately. The Federal Circuit decision does not impact the Board's jurisdiction to hear protests challenging the legality of solicitation requirements.

1. The Solicitation Provisions Interpreted By The Federal Circuit Have No Significance Beyond The Case At Bar

This case is a dispute between the companies who responded to a solicitation of the U.S. Department of Interior for the acquisition of automatic data processing systems. The licensing provisions of that solicitation were unique to the procurement. The agency disqualified SMS because SMS failed to comply with what the agency believed were the clearly stated requirements of the solicitation. The Board, however, interpreted the licensing provisions of the solicitation differently and found that SMS should not have been disqualified. On appeal, the Federal Circuit held that the Board's interpretation had departed from the plain meaning of the solicitation's requirements and reinstated that award to Data General.[2]

As is evident from a reading of the Federal Circuit's decision, the correct interpretation of the solicitation's licensing requirements and SMS's proposals in response thereto was

[2] "The [software licensing] provision could not be clearer." SMS' Petition, p. 20a.

grounded in the particular language of the solicitation and the actions of SMS and the agency during the procurement. These are not matters of unusual importance or widespread impact such that Supreme Court review is appropriate; to the contrary, these interpretational issues have no apparent significance except to those who are parties to the dispute.

II. SMS Mischaracterizes The Federal Circuit's Statements Regarding The Board's Authority

SMS' Petition is premised on an incorrectly framed issue and a misconception of the Federal Circuit's decision. SMS characterizes the Federal Circuit's decision as concluding "that the Board has no jurisdiction to enforce those portions of CICA which deal with specifications." SMS' Petition, p. 22. The Federal Circuit said no such thing. The distinction which SMS totally overlooks is that the Board's jurisdiction is limited to correcting agency actions which are not in compliance with statute or regulation, 40 U.S.C. § 759(f)(1) and 759(f)(5)(B); where there is no violation of statute or regulation, the Board may not interfere with the agency's procurement actions, including the agency's solicitation requirements. *Id.*

There can be no doubt, as SMS states, that the Board has jurisdiction to review an agency's technical specifications for compliance with statute and regulation. In preparing its technical specifications, the agency must comply with the CICA requirements that it "specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement" and to "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law." 41 U.S.C. §§ 253a(a)(1)(A), 253a(a)(2)(B) (1988). SMS' Petition, pp. 18, 20. Under the Board's rules, a challenge to the clarity

of a solicitation's provisions or an allegation that those provisions are unduly restrictive must be brought prior to the closing date for receipt of initial proposals.[3] In this case, there was no protest filed by SMS or any other party alleging that the solicitation's licensing requirements were unduly restrictive or otherwise illegal. There has never been any dispute as to the legality of the software licensing requirements.

SMS' protest was brought because of its disqualification from the competition due to its failure to comply with the solicitation's licensing requirements. The issues were the proper interpretation of the solicitation and of SMS' proposal. The Board's review was not of the legality of the licensing requirements, but rather their proper interpretation and SMS' compliance therewith. It was in this context that the Federal Circuit stated, and correctly so, that the Board could not base its decision on the substitution of its own views for those of the agency as to the *wisdom* of the agency's licensing requirements. Where there is no question of the legality of the agency's technical specifications, the Board's statutory role is at an end.

Nor is there a conflict between sections 759(e) and 759(f) of the Brooks Act, 40 U.S.C. § 759. Section 759(f) gives the Board authority to act where there is a violation of statute or regulation. Section 759(e) confirms that in the absence of such violation, the Board may not interfere. The Board itself recognizes the limitation which section 759(e) places on its actions:

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[3]Rule 5(b)(3)(i) of the Board's Rules states:

> A protest based upon alleged improprieties in any type of solicitation which are apparent before bid opening or the closing time for receipt of initial proposals shall be filed before bid opening or the closing time for receipt of initial proposals.
>
> ....

> [S]ubsection (g) of the Brooks Act [now 40 U.S.C. § 759(e)] instructs the Administrator that he may not "impair or interfere with the determination by agencies of their individual automatic data processing requirements." So long, therefore, as we are in an area where an agency has *legitimately* determined its requirements, we cannot interfere.

Memorex Corp., GSBCA No. 7927-P, 85-3 BCA ¶ 18,289 (1985) at 91,787 (emphasis in original).

Moreover, the Board has not interpreted the Federal Circuit's decision as an infringement upon its jurisdiction to consider protests of allegedly illegal technical specifications. Since the issuance of the Federal Circuit's decision on October 9, 1990, the Board has continued to hear and decide such protests. *See, e.g., GTE Telecom Inc.*, GSBCA Nos. 10986-P, 10987-P, 1991 GSBCA LEXIS 54 (Jan. 24, 1991); *ViON Corp.*, GSBCA No. 10218-P-REM, 1990 GSBCA LEXIS 599 (Oct. 24, 1990).[4]

CONCLUSION

SMS is simply incorrect in contending that the Federal Circuit's decision makes improper inroads on the Board's authority. Rather, the decision reminded the Board that in the absence of a violation of statute or regulation, the Board cannot base its decisions on its own views of the agency's data processing needs — a restriction recognized by the Board but seem-

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[4]Even assuming *arguendo* that the Federal Circuit incorrectly characterized the Board's authority, such error would not be dispositive of the case. The Federal Circuit's decision was based on the Board's failure to apply the plain meaning of the solicitation's licensing specifications. It was only in explaining what had apparently led the Board to commit its interpretational errors that the Board's authority was discussed. SMS' Petition, pp. 17a-18a, 37a-38a.

ingly forgotten in its decision granting the SMS protest. Apart from the fact that the Federal Circuit's decision does not affect the Board's recognized jurisdiction, that issue is not dispositive of the case. The interpretational issues, which are dispositive, are not important to anyone other than the litigants.

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

Richard J. Webber
Counsel of Record

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6254

Counsel for Respondent
Data General Corporation

March 8, 1991

(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1990

SMS DATA PRODUCTS GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
FRANK A. ROSENFELD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the General Services Administration Board of Contract Appeals had misinterpreted the terms of a Department of the Interior solicitation for bids on a data processing contract.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 915 F.2d 1544. The opinion of the General Services Administration Board of Contract Appeals (Pet. App. 40a-105a) is reported at 90-2 B.C.A. (CCH) ¶ 22,799.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1990. A petition for rehearing was denied on November 6, 1990. Pet. App. 106a-107a.

The petition for a writ of certiorari was filed on February 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1989, the United States Geological Survey, Department of the Interior (USGS), issued Solicitation No. 7510 for acquisition of computer systems intended for use in over 200 field offices. Pet. App. 2a-3a. Mandatory specifications included "an unlimited license for software use," whereby "all users of the system are allowed to execute the software simultaneously and the software may be executed on all processors that are part of the system." *Id.* at 19a-20a. Petitioner SMS Data Products, Inc., respondent Data General Corporation, and Lockheed Missiles and Space Co., Inc., each submitted proposals that passed the required benchmark demonstration. As a result, the USGS informed the firms that "price would control [the] award." *Id.* at 10a.

Petitioner then submitted a Best and Final Offer (BAFO) that was the "lowest-priced offer." Pet. App. 10a. The USGS realized, however, that petitioner's proposal—as clarified by a letter postdating its BAFO—was the lowest because the proposal offered only limited software licenses. The USGS determined that petitioner's proposal did not offer licenses permitting all users to use software simultaneously (as required by the bid solicitation), but rather offered licenses provided on a "per user" basis sufficient to cover only one user at each workstation. Moreover, the USGS found that petitioner's proposal did not license software to all processors (as required by the bid solicitation). Instead, the proposal "split" the licensing of its data base program into front-

end and back-end packages, with the latter licensed for only a small percentage of the total number of processors in the evaluated system. See *id.* at 10a-12a.

In light of petitioner's failure to satisfy the solicitation's licensing requirements, the USGS in December 1989 "disqualified [petitioner] from the competition and awarded the contract to Data General, which had submitted the next-lowest priced responsive offer." Pet. App. 13a. Petitioner and Lockheed then filed separate protests to the General Services Administration Board of Contract Appeals (Board). See 40 U.S.C. 759(f).*

2. In March 1990, the Board granted petitioner's protest, holding that the USGS, "if it intends to procure [the solicitation's] requirements, must amend the solicitation to reflect its true software licensing requirements and conduct further discussions with the offerors, and make award on the basis of revised BAFOs." Pet. App. 41a-42a.

The Board first concluded that petitioner could reasonably have read the solicitation to allow licensing limited to only one user at each workstation. Pet. App. 90a-92a. The Board also interpreted the solicitation to permit petitioner to propose software licenses authorizing use of back-end software on some —but not all—processors. *Id.* at 95a. The Board thus concluded that the USGS should not have disqualified petitioner for failing to submit a proposal meeting the solicitation's specifications.

The Board also directed the USGS to revise its solicitation and then seek new BAFOs if it insisted on the requirements that petitioner failed to meet,

---

* The Board denied Lockheed's separate protest, Pet. App. 105a, and Lockheed sought no further review of that ruling.

namely, unlimited users and front-end and back-end software on all processors. Pet. App. 104a-105a. The Board recommended, however, that the USGS abandon these requirements since they were not necessary:

> We believe that [the USGS] should reconsider whether it really wants to be charged the inevitable higher prices for something—unlimited simultaneous use of software packages—which, in effect, it admits in its solicitation it will rarely if ever need. * * *
>
> [Petitioner] has made a convincing case for questioning whether as a practical matter it makes sense to have or pay for a complete database package resident on the 5,148 work stations. Wouldn't it truly be "incredibly stupid" to run * * * back-ends on diskless work stations, as testified by Data General's own expert?

Id. at 94a-95a.

3. On an appeal filed by Data General, the Federal Circuit reversed, concluding that "[t]he board's decision rests on a misinterpretation of the * * * solicitation and a misunderstanding of its own limited procurement role." Pet. App. 17a. First, the court of appeals held that the Board "disregarded the plain meaning of the licensing provision," which "unequivocally requires bidders to provide software licenses not limited to any specific number of users or particular processing configuration." *Id.* at 17a-18a. Petitioner's proposed split of front-end and back-end licenses and its pricing of software licenses on a per user basis, the court determined, violated the plain terms of the solicitation. *Id.* at 19a-25a.

Second, the court of appeals concluded that the Board "erroneously equated the terms 'user' and 'workstation,' leading it to misinterpret [petitioner's] proposal as technically compliant." Pet. App. 18a. Petitioner could not assume one user per workstation, the court explained, given the large number of users with access to the systems, both because there will be multiple users at each workstation and because of extensive remote access to the systems by outside parties through the users' own equipment. *Id.* at 25a-26a; see also *id.* at 26a-31a.

Third, the court determined that the Board erroneously relied on the "simplified" parameters of the benchmark demonstration test, which artificially assumed one user per workstation. In the court's view, the Board thus disregarded the flexibility in configurations that the solicitation specifically required for the actual systems when installed. Pet. App. 18a, 32a-36a.

Finally, the court observed that "[t]he board's independent assessment of whether the agency would or should" impose its front-end/back-end and unlimited user requirements "is also illegal, at least to the extent it infected the board's analysis of both the solicitation and the technical compliance of [petitioner's] offer." Pet. App. 37a. Under 40 U.S.C. 759(e), the court pointed out, the Board may not "interfere with the determination by agencies of their individual data processing equipment requirements." Consequently, the Board "has no warrant to question the agency's judgment or to revise its delegation of procurement authority to ensure that the agency's assessment of its 'true' needs is in harmony with the board's." Pet. App. 39a.

ARGUMENT

1. Petitioner broadly contends that the Federal Circuit "has improperly narrowed the scope of the Board's bid protest jurisdiction." Pet. 15. In particular, petitioner argues (Pet. 25-28, 26-32) that the court of appeals erred in applying the proscription of 40 U.S.C. 759(e), which prohibits the General Services Administration from acting "to impair or interfere with the determination by agencies of their individual data processing requirements," to circumscribe the Board's review of bid protests.

That issue is not presented here. In its review of petitioner's protest, the Board did not directly assert any such authority "to impair or interfere with the [USGS's] determination * * * of [its] data processing requirements." 40 U.S.C. 759(e). To the contrary, the Board expressly allowed the USGS to impose its chosen requirements—albeit with the pointed suggestion that the agency reconsider those aspects of the solicitation. See Pet. App. 94a ("We believe that [the USGS] should reconsider whether it really wants to be charged the inevitable higher prices for something—unlimited simultaneous use of software packages—which, in effect, it admits in its solicitation it will rarely if ever need."). Accordingly, until the Board renders a decision asserting authority, despite Section 759(e), to redefine a contracting agency's data processing needs—and the Federal Circuit has an occasion squarely to address that issue—further review of petitioner's claim on the record presented here would be premature.

2. Petitioner also contends (Pet. 18-26) that the court of appeals exceeded its authority because the Board's decision fell within its jurisdiction under 40 U.S.C. 759(f)(5)(B), which authorizes the Board to require agency compliance with applicable "stat-

ute[s] or regulation[s]." In particular, petitioner points to 41 U.S.C. 253a(a)(1)(A), requiring an agency to draw up specifications for data processing solicitations "in a manner designed to achieve full and open competition," and to 41 U.S.C. 253a(a)(2)(B), authorizing an agency to impose "restrictive provisions or conditions only to the extent necessary to satisfy [its] needs * * *." Again, petitioner is attacking a straw man. In its decision overturning the USGS's contract award, the Board nowhere purports to resolve the case on the grounds that the agency violated the directives set forth in Section 253a. That is readily understandable in light of petitioner's failure before the Board to challenge the USGS's decision on that score. See also Data General Br. in Opp. 5-6.

At bottom and despite petitioner's characterizations, this case involves a straightforward fact-specific issue, namely, whether the Board misinterpreted the terms of the USGS's solicitation for bids on a particular data processing contract. The court of appeals' resolution of that question is unexceptionable. Further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
FRANK A. ROSENFELD
Attorneys

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